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LIBERAL BIAS IN THE LEGAL ACADEMY: OVERSTATED AND UNDERVALUED

*Michael Vitiello**

I. INTRODUCTION

By many accounts, universities are hotbeds of left-wing radicalism.[1] Often fueled by overreaching administrators, right-wing bloggers and radio talk show hosts rail against the suppression of free speech by the "politically correct" left wing.[2] Over the past twenty years, numerous and mostly conservative commentators have published books decrying radical professors and their efforts to force their own political vision on their students.[3] Most recently, former Communist turned hard-right

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* Distinguished Professor and Scholar, Pacific McGeorge School of Law; B.A. Swarthmore, 1969; J.D. University of Pennsylvania, 1974. I want to extend special thanks to a wonderful group of research assistants who ran down obscure footnotes and converted oddball citations into Bluebook form—thanks to Cameron Desmond, Oona Mallett, Alison Terry, Jennifer L. Williams, and to my colleagues Greg Pingree and University of Mississippi Professor Michael Hoffheimer for their helpful input. I also want to single out three left leaning professors who inspired many of the thoughts in this article. My colleague Brian Landsberg and my former colleague Joshua Dressler demonstrate the best traits of liberal law professors. Both in the classroom and in private discussions, they ask hard questions and do not accept superficial answers. Both have helped me repeatedly in casual conversations, at works-in-progress, and in comments on drafts of articles. Finally, I want to dedicate this article to my brother Justin Vitiello, recently retired from Temple University in Philadelphia where he taught in the Italian Department. His politics lean far to the left and yet I doubt that any of his students could claim bias. He was a passionate teacher, committed to his subject matter and to his students. His intensity inspired generations of students to learn from him.

[1] DAVID HOROWITZ, THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA (2006); DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (Free Press 1998) (1991); ROGER KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (rev. ed. 1998) (1990); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (Harper Perennial 1999) (1998).

[2] FrontPage Magazine, http://www.frontpagemag.com (last visited May 16, 2007); Students for Academic Freedom, http://www.studentsforacademicfreedom.org/ (last visited May, 16, 2007); Campus Watch: Monitoring Middle East Studies on Campus, http://www.campus-watch.org/ (last visited May 16, 2007).

[3] *See, e.g.*, JIM NELSON BLACK, FREEFALL OF THE AMERICAN UNIVERSITY: HOW OUR COLLEGES ARE CORRUPTING THE MINDS AND MORALS OF THE NEXT GENERATION (2004);

activist David Horowitz has lobbied legislatures to investigate the left-wing bias in state institutions and to enact a student bill of rights.[4]

According to Horowitz, students need protection not only because professors interject their political views into the classroom, but also because professors demonstrate an overwhelming left-wing bias.[5] Further, professors have stifled conservative students from openly discussing their ideas.[6] And worse, Horowitz raises concern that left-wing professors force their students to share their political views in order to get good grades.[7]

Until recently, little attention was focused on the left-wing leanings of law professors. Even when law professors have written about the problems of the politically correct, they have focused primarily on the excesses of undergraduate administrators and professors.[8] More recently, however, the publication of

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ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS (1988); PETER COLLIER & DAVID HOROWITZ, SURVIVING THE PC UNIVERSITY: THE BEST OF HETERODOXY (Center for the Study of Popular Culture 1996) (1993); D'SOUZA, *supra* note 1; HOROWITZ, *supra* note 1; KIMBALL, *supra* note 1; KORS & SILVERGLATE, *supra* note 1; BEN SHAPIRO, BRAINWASHED: HOW UNIVERSITIES INDOCTRINATE AMERICA'S YOUTH (2004).

[4] *See* Students for Academic Freedom, *supra* note 2 (follow "Horowitz Testimonies to Legislative Bodies" hyperlink under "Actions Nationwide" section); FrontPage Magazine, http://www.frontpagemag.com/Articles/Read.aspx?GUID=7C9ADC99-43A8-463F-BC96-3B46613CCBFD (last visited May 16, 2007) (on file with the *Mississippi Law Journal*).

[5] *See* HOROWITZ, *supra* note 1; FrontPage Magazine, *supra* note 4.

[6] *See* HOROWITZ, *supra* note 1; FrontPage Magazine, *supra* note 4; Students for Academic Freedom, *supra* note 2.

[7] *See* HOROWITZ, *supra* note 1; David Horowitz, How to Get an "A" at One Elite School, FrontPage Magazine (May 11, 2005), http://www.frontpagemag.com/Articles/Read.aspx?GUID=DE67CA4C-8E72-4404-934C-26D0A4949513 (on file with the *Mississippi Law Journal*).

[8] *See, e.g.*, KENNETH LASSON, TREMBLING IN THE IVORY TOWER: EXCESSES IN THE PURSUIT OF TRUTH AND TENURE 113-90 (2003). Lasson's book is largely a compilation of three of his law review articles; the article focusing most closely on the problems of the politically correct is Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689 (1996), which draws most of its examples from undergraduate programs.

an empirical study of law professors' affiliations has increased attention on the leftward leanings of law professors.[9]

After identifying an overwhelming liberal or left-wing bias in the legal academy, McGinnis, Schwartz and Tisdell's article (hereinafter the *Georgetown* study), in effect, hoists the left "on its own petard."[10] Nearly two decades ago, as many universities expanded groups qualifying for affirmative action, proponents of affirmative action abandoned its historical remedial purpose and argued instead that it served universities' need for intellectual diversity and the representation of multiple points of view.[11] Turning these arguments on the left, the *Georgetown* study points out the absence of intellectual diversity, as demonstrated by the overwhelming number of law professors who contribute to liberal causes and are members of the Democratic

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[9] John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty,* 93 GEO. L.J. 1167 (2005).

[10] The phrase, meaning "hangman hanged by his own rope," was coined by Shakespeare in *Hamlet* and is based on a not-uncommon occurrence in medieval warfare wherein the engineer who lit the petard, a small bomb used to breach fortification walls and gates, was caught up in the rope used to hoist the bomb over the wall and was blown up by the device. Wikipedia, http://en.wikipedia.org/wiki/Petard (last visited June 14, 2007).

[11] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In a split decision, with a narrow majority, the Court determined that a quota-type system as employed by the petitioner was prohibited, but that race could be considered as a factor in the admissions process. While four Justices upheld the quota system as an attempt to remedy prior disadvantages suffered as a result of racial prejudice, four would have denied it as violating Title VI. In Justice Powell's opinion, which gave the fifth vote to the invalidation of the quota program, he compared the quota system with an approach that sought to include race as a "plus" factor but was not used to reserve certain admissions slots for limited racial groups. *Id.* at 317. Of the rationales the petitioner forwarded to consider race in the process, only the one arguing for attaining a diverse student body withstood scrutiny. *Id.* at 311-12. Four Justices upheld using a racial quota in an attempt to remedy prior disadvantages suffered as a result of racial prejudice, but Justice Powell noted that this rationale was premised on the "stigma" attached to the prior prejudice and not an interpretation of the Equal Protection Clause. *Id.* at 295 n.34. *See also* Grutter v. Bollinger, 539 U.S. 306 (2003) (finding that creating diversity on campus is a compelling interest that can justify the use of a race-conscious admissions process for university admissions and endorsing the view forwarded by Justice Powell in *Bakke*). Prior to *Grutter*, many universities accepted Justice Powell's opinion in *Bakke* as precedent and applied his narrow interpretation that to be constitutional in its approach to race-conscious admissions, they could not look at past stigma, but rather had to be cognizant of individual rights and could justify their approach by basing it on a compelling interest to create diversity on campus, as Justice Powell had asserted.

Party.[12] While the *Georgetown* study is cautious in proposing remedies to liberal bias,[13] others have called for what amounts to affirmative action for a new group of underrepresented voices, essentially Republicans, and especially Republican women.[14]

This article focuses on the assertion that law faculties lean unacceptably to the left. Section II outlines the attack, focusing mostly on Horowitz's efforts to enact measures aimed at "curing" liberal bias. It also discusses the more recent attention directed at the alleged discrimination against conservatives by law faculties. Section III describes the data that purport to show the hard left leanings of professors generally and law professors specifically. Section IV examines the data more closely. It concedes that law faculties may be further left than the legal profession as a whole, but the data do not support the conclusion that law faculties tilt far to the left.[15] It questions the *Georgetown* study's methodology that skewed the data.[16] The data largely equate membership in the Democratic Party with liberalism. No one can seriously contend that membership in the Democratic Party is synonymous with liberalism. Further, relying on support for particular issues like abortion rights is

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[12] McGinnis, Schwartz & Tisdell, *supra* note 9. *See also* HOROWITZ, *supra* note 1, at xxxiii-xxxv.

[13] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1198.

[14] *Cf.* DVD: 2006 Ronald A. Cass, Dean Emeritus, Boston University School of Law, debate with Michael Vitiello, Professor of Law, University of Pacific McGeorge School of Law (University of California at Davis King Hall School of Law 2006) (on file with the author) [hereinafter DVD] (indicating there is a marked effort to maintain a liberal bias in law school faculty and that those whose political views vary from liberal members of the hiring committee are less likely to be hired, and that this bias should be corrected for the betterment of the academy by making sure that conservatives get jobs); McGinnis, Schwartz & Tisdell, *supra* note 9, at 1203 (discussing the advantages of "ideological diversity program[s]" and programs to make sure there are "substantial numbers of conservatives and Republicans represented at faculty workshops and as visiting faculty members" on law school campuses); *id.* at 1179 (stating that "while the percentage of politically active female law professors is almost as high as the percentage of politically active male professors, politically active female professors are substantially more Democratic than their male counterparts").

[15] *See infra* note 146 and accompanying text.

[16] *See infra* notes 123-25, 134-38 and accompanying text. *See also* McGinnis, Schwartz & Tisdell, *supra* note 9, at 1172-73. The authors exclude adjunct faculty on the supposition that they do not "wield the same influence" as full-time faculty. *Id.* at 1180. The authors further indicate that baby-boomer professors are the most liberal and that there appears to be a trend that Post-Baby Boomers are less liberal. *Id.*

not indicative of a person's overall political leanings.[17] Other data suggest that professors are more centrist than the critics contend.[18] Even conceding that law faculties are left of the political center, Section IV also considers whether law faculties discriminate in hiring practices.[19] Critics assert without careful analysis that the resulting composition of university and law faculties is a result of discrimination.[20] However, as developed below, critics offer little evidence of intentional discrimination and make no effort to examine the applicant pool.[21] Further, this section argues why conservatives may not enter the teaching job market in large numbers.[22]

Even on the assumption that law faculties tip to the left of the political spectrum, before one can even address remedying the situation, one must ask whether this state of affairs is a problem. Section V examines whether the widely assumed liberal bias of their professors puts conservative students at a disadvantage.[23] The section examines claims of bias in grading at the undergraduate level and efforts to rebut those claims.[24] Further, it argues why law students should have even less concern than undergraduates that their views influence their grades.[25] Finally, that section concludes by arguing that critics, like Horowitz, run the risk of making conservative students into the new class of victims.[26] As such, they do conservative students a disservice and they leave themselves open to one of their criticisms of politically correct faculties and administrators.[27]

Absent evidence of harm to our students, one wonders whether the legal academy needs to fix the perceived problem.

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[17] *See infra* notes 157-61 and accompanying text.

[18] *See infra* note 152 and accompanying text.

[19] *See infra* notes 163-67 and accompanying text.

[20] *See* HOROWITZ, *supra* note 1; LASSON, *supra* note 8; McGinnis, Schwartz & Tisdell, *supra* note 9, at 1203 (the article does not state that there is evidence of discrimination, but indicates that there may be tendencies to unconsciously discriminate among a group of like-minded people).

[21] *See infra* notes 167-68 and accompanying text.

[22] *See infra* notes 186-91 and accompanying text.

[23] *See infra* notes 193-95 and accompanying text.

[24] *See infra* notes 196-200 and accompanying text.

[25] *See infra* notes 204-25 and accompanying text.

[26] *See infra* notes 252-60 and accompanying text.

[27] *See infra* notes 258-60 and accompanying text.

But, on the assumption that some marginal harm exists, Section VI discusses possible remedies. Horowitz's proposed student bill of rights is fraught with difficulties, especially in the law school setting.[28] Furthermore, some of the proposals smack of affirmative action for Republican women, which is certainly an ironic remedy to emerge from the right wing—the historic foe of affirmative action.[29]

Critics contend that, even apart from adverse effects on students, law professors are an intellectual elite with special influence over the direction of the law.[30] Section VII addresses that concern and concludes that, at best, especially by comparison to the substantial influence of conservative foundations and think-tanks, leftward leaning law professors can hope to have marginal influence on the law.[31]

This article concludes with a warning and a recommendation. Liberals should not underestimate the attack on the academy. Elsewhere, liberals have reacted too slowly to the disciplined message of the right wing; that failure has been costly.[32] A careful empirical study of the applicant pool for law teaching positions was beyond the scope of this article, but such a study should be performed. Liberals ought to be proactive in anticipating the kind of broadside attack that Horowitz launched on undergraduate faculty.

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[28] *See infra* notes 261-66 and accompanying text.

[29] *See* Peter H. Schuck, *Leftward Leaning*, THE AMERICAN LAWYER (Dec. 1, 2005), *available at* http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1133258711465 (on file with the *Mississippi Law Journal*) (stating that the most underrepresented group among top-tier law school professors are white female Republicans, and that the best way to add viewpoint diversity to law school faculty is to increase the number of hires from that group; the author further states that this viewpoint diversity will always run counter to traditional affirmative action hires.)

[30] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1190-98 (indicating that law professors influence the law by signing open letters, writing amicus briefs, working on American Law Institute restatements and in judicial ratings).

[31] *See infra* notes 270-307 and accompanying text.

[32] *See* MARK HALPERIN & JOHN F. HARRIS, THE WAY TO WIN: TAKING THE WHITE HOUSE IN 2008, 3-23 (2006) (discussing the 2004 presidential election and how the portrayal of John Kerry in the news media affected his campaign and his national image).

II. LEFTWARD HO

One can fill a bookshelf with attacks on colleges and universities. The themes are common: left-wing radicals have highjacked higher education.[33] Relying on a claim of academic freedom, left-wing radicals use their classrooms to proselytize their students and to suppress the speech of dissenters.[34] Many of these books use similar events on college campuses to demonstrate the pervasiveness of politically correct thinking that favors protected groups, including minorities, gays, and women, at the expense of the rights of other students.[35]

For many years, academics could ignore such charges because they had little impact on day-to-day operations of colleges and universities. As with much in our lives, that changed with the events of 9/11. A number of professors made statements sympathetic to the perpetrators and critical of America, at times blaming the United States for the attacks.[36] Such statements provided critics of liberal domination of higher education with powerful evidence of widespread and dangerous radicalism.[37] Most notable has been David Horowitz, once the darling of the left, now a vocal right-wing activist.[38]

Horowitz has gone beyond simply writing about left-wing bias on campuses. He has drafted a student bill of rights and an academic bill of rights, set up a website to advance his cause,

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[33] *See* HOROWITZ, *supra* note 1; D'SOUZA, *supra* note 1; KIMBALL, *supra* note 1; KORS & SILVERGLATE, *supra* note 1.

[34] *See* HOROWITZ, *supra* note 1; D'SOUZA, *supra* note 1; KIMBALL, *supra* note 1; KORS & SILVERGLATE, *supra* note 1.

[35] *See* HOROWITZ, *supra* note 1; KORS & SILVERGLATE, *supra* note 1, at 9-33. Horowitz recounted the story of a student at the University of Pennsylvania who made a comment out of his dorm room window at a group of young black women (calling them water buffalo), which was seen as being politically incorrect. The women were offended, and the university took judicial action against the male student for using a racial epithet, though he had not intended such by the remark, but was merely commenting on the women being loud and shouting as they walked past his dorm room window as he studied. Apparently, water buffalo is a literal translation of the Hebrew slang term *behema*, which is used to refer to a thoughtless or rowdy person. *Id.*

[36] *See* HOROWITZ, *supra* note 1. *See also infra* note 62.

[37] *See* HOROWITZ, *supra* note 1.

[38] *See* HOROWITZ, *supra* note 1, at xlvi-xlvii; FrontPage Magazine, http://www.frontpagemag.com/ (follow "Horowitz" hyperlink, then follow "Biography" hyperlink) (last visited May 16, 2007).

and lobbied legislatures to conduct hearings into left leaning bias on college campuses.[39]

The Academic Bill of Rights and the Student Bill of Rights have superficial appeal. For example, they call for such unobjectionable statements like the following bullet items in the Academic Bill of Rights:

> 1. All faculty shall be hired, fired, promoted and granted tenure on the basis of their competence and appropriate knowledge in the field off their expertise . . . . No faculty shall be hired or fired or denied promotion or tenure on the basis of his or her political or religious beliefs.
>
> 2. No faculty member will be excluded from tenure, search and hiring committees on the basis of their political or religious beliefs.
>
> 3. Students will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study, not on the basis of their political or religious beliefs.[40]

The Student Bill of Rights contains similar high sounding language. For example, it states that:

> Academic freedom consists in protecting the intellectual independence by professors, researchers and students in the pursuit of knowledge and the expression of ideas from interference by legislators or authorities within the institution itself. This means that no political, ideological or religious orthodoxy will be imposed on professors, researchers and students through

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[39] *See* Students for Academic Freedom, *supra* note 2 (follow the "Academic Bill of Rights" hyperlink and the "Student Bill of Rights" hyperlink) (last visited May 16, 2007) [hereinafter Academic Bill of Rights and Student Bill of Rights].

[40] Academic Bill of Rights, *supra* note 39. *See also,* Students for Academic Freedom, *supra* note 2 (follow the "National and State Legislation Texts" hyperlink) (last visited May 16, 2007). There is an effort to have all states or universities enact such a bill of rights to protect "intellectual diversity" on campuses nationwide. *Id.* (follow the "Contribute and Sustain the Campaign" hyperlink) (last visited May 16, 2007). While the goals indicated in the language of the Academic Bill of Rights appear innocuous and nonpartisan, its contribution letter says that the organization is "challenging the political harassment of conservative and religious students in the classroom, and the general abuse of the university for political agendas including professional 'teach-ins' that provide one-sided lessons about war and peace." *Id.*

> the hiring or tenure or termination process, or through the grading system or through the control of the classroom or any other administrative means. Nor shall legislatures impose any such orthodoxy through their control of the university budget.[41]

Despite such high sounding principles, Horowitz seems to have violated some of his own ideals. While he has lobbied legislatures to pass his bills of rights,[42] he has also urged them to conduct hearings into liberal bias on state supported campuses.[43] Many academics believe that these charged hearings are intended to intimidate faculty members.[44]

One does not have to look far for proof that Horowitz and his supporters are not interested in neutral principles of academic freedom. His efforts are part of a larger attack on campus liberals. They are part of a concerted effort to compel teaching of conservative ideas, almost certainly ideas like intelligent design and theories opposing global warming,[45] hiring of more

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[41] Student Bill of Rights, *supra* note 39.

[42] Students for Academic Freedom, *supra* note 2 (follow the "National and State Legislation Texts" hyperlink) (last visited May 16, 2007).

[43] David Horowitz & Eli Lehrer, *Political Bias in the Administrations and Faculties of 32 Elite Colleges and Universities*, FRONTPAGE MAGAZINE (on file with author) [hereinafter Horowitz & Lehrer]. "[A] remedy for this problematic situation [of liberal bias among academic faculties] would be for universities and state legislatures to adopt an Academic Bill of Rights stressing the importance of intellectual diversity to the goal of academic freedom, and making this goal an integral part of educational policy." *Id.*

[44] John Gravois, *Professor Sues David Horowitz Over Use of Photo*, THE CHRONICLE OF HIGHER EDUCATION (May 26, 2006), *available at* http://www.chronicle.com/daily/2006/05/2006051205n.htm. Professor Gravois argued that Horowitz attempted to intimidate academics who criticized the Bush administration. *See also* Jennifer Jacobson, *Tilting at Academe*, THE CHRONICLE OF HIGHER EDUCATION (March 24, 2006), *available at* http://www.chronicle.com/weekly/v52/i29/29a02501.htm [hereinafter *Academe*] (stating that many legislators and academics also believe the hearings to be a waste of time and money).

[45] *Cf.* Academic Bill of Rights, *supra* note 39. Within the Academic Freedom section, the Practice subsection provides the following:

> 4. Curricula and reading lists in the humanities and social sciences should reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate.
>
> 5. Exposing students to the spectrum of significant scholarly viewpoints on subjects examined in their courses is a major responsibility of the faculty. Faculty will not use their courses for the purpose of political, ideological, religious or anti-religious indoctrination.

conservative faculty,[46] and playing into the fear of conservative students that they are unfairly graded because of their conservative views.[47]

Right-wing critics rely on anecdotal evidence to prove left-wing bias on college campuses. They recycle the same examples of politically correct behavior by professors and administrators, often silencing conservative students.[48] But, they also rely on empirical data to support their claims of overwhelming left-wing bias on campuses.[49]

While the right-wing critique of colleges and universities has developed over the past twenty years, law schools have remained largely on the sideline. Most of the events that fueled

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Id.

When taken together these two practical standards would require the teaching of intelligent design, because not teaching it would be an example of "anti-religious indoctrination"; teaching theories opposing global warming may also be required as providing a "dissenting source[] [or] viewpoint[]" where we do not, as humans, have a settled account. *Id.*

[46] *See* HOROWITZ, *supra* note 1, at xxxiii-xli (arguing that, based on the idea of group polarization, hiring a representative faculty of both liberals and conservatives is appropriate to remedy extremism on academic faculties, but that the lack of conservatives on faculty hiring committees make this an impracticability).

[47] *See, e.g., Academe*, *supra* note 44 (stating that approximately fifty college students complained of political discrimination in the classroom, prompting a conservative Pennsylvania state lawmaker to call for hearings about political bias on college campuses); Posting of David Horowitz to FPM blog, http://www.frontpagemag.com/blog/Read.aspx?GUID=4BED8421-7F6E-4761-A296-E64B98921594 (June 19, 2003, 08:55 EST) (last visited Mar. 3, 2007) (recounting the story of an ROTC student who went to his Vietnam War class at Bowling Green University in his uniform and was repeatedly chastised by his professor for being a part of the "America[n] . . . imperialist monster" and was then given a failing grade at the end of the course).

[48] *See, e.g.,* Rick Moran, Enjoying the Academic Freedom to Be an Idiot (July 20, 2006), http://www.frontpagemag.com/Articles/Printable.aspx?GUID={3F2E29FE-871E-4233-9A3C-433912F6D70F}; John Gravois, *Wisconsin Provost Will 'Review' Teaching of Instructor Who Calls the 9/11 Attacks an 'Inside Job,'* THE CHRONICLE OF HIGHER EDUCATION (July 3, 2006), *available at* http://chronicle.com/daily/2006/07/2006070303n.htm; Stanley Fish, *Conspiracy Theories 101*, N.Y. TIMES (July 23, 2006), *available at* http://www.nytimes.com/2006/07/23/opinion/23fish.html?ex=1311307200&en=eb67d7b666d8ae71&ei=5090&partner=rssuserland&emc=rss; Piper Fogg, *U. of New Hampshire Defends Free-Speech Rights of Professor Who Blames Government for 9/11*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 30, 2006), *available at* http://chronicle.com/daily/2006/08/2006083005n.htm (all discussing one lecturer at the University of Wisconsin at Madison who contended that the falling of the twin towers on 9/11 was actually a conspiracy by the federal government to incite war with Iraq and Arabs). *See also* LASSON, *supra* note 8; HOROWITZ, *supra* note 1.

[49] *See, e.g.,* McGinnis, Schwartz & Tisdell, *supra* note 9; Horowitz & Lehrer, *supra* note 43.

claims of suppression of ideas took place in undergraduate programs.[50] Few of the most notorious radical professors are law professors.[51]

More recently, conservatives have started to focus more closely on the leftward tilt of law schools as well. The right wing now includes the *Georgetown* study as more evidence of the left-wing bias of American education.[52] As a result, the media has paid more attention to law professors' left leanings.[53]

The net effect of these efforts and the literature proclaiming a left-wing bias on campuses is an increasing perception of discrimination by liberals against conservatives and of a suppression of conservative ideas. Such discrimination flies in the face of liberal ideals. Before conceding these charges, however, one ought to look closely at the charges against the left. The next section examines the data to access whether it supports some of the more extreme claims.

III. DESCRIBING THE DATA

Several reviewers provided "advance praise" for Horowitz's *The Professors*. Three are worth quoting at this juncture. A trustee for the State University of New York praised *The Professors* as "a comprehensive and persuasive survey of the contemporary university." She stated further that:

> It demonstrates beyond reasonable doubt that political extremists like Professor Ward Churchill[54] are a common and influen-

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[50] *See, e.g.*, LASSON, *supra* note 8, at 113-90. Even with a law professor as an author, the majority of the examples of correct conduct in the academy in his book was from undergraduate schools, with only a small minority of the anecdotal evidence coming from law schools. *Id.* at 197-245.

[51] *See, e.g.*, HOROWITZ, *supra* note 1 (only five of the professors profiled are law professors: Regina Austin, at 26; Derrick Bell, at 56; David Cole, at 96; Bernardine Dohrn, at 125; and Mari Matsuda, at 277).

[52] *See* DiscovertheNetworks, http://www.discoverthenetworks.org/ (follow the "academia" hyperlink) (last visited May 16, 2007) (on file with the *Mississippi Law Journal*) (citing the assertion from the *Georgetown* article that, of politically active law school professors, 81% donated to Democratic campaigns while only 15% donated to Republicans as an indication of leftist politicization of institutions of higher learning).

[53] *See, e.g.*, Schuck, *supra* note 29.

[54] Ward Churchill is a Professor of Ethnic Studies at Colorado University who gave a controversial speech about 9/11 that has been understood to mean that he blames America for being attacked. He also published political statements to that effect in a

> tial presence on college and university faculties in the United States. David Horowitz's book should be read by every college administrator and every scholar who is concerned about the abuse of the university classrooms and the debasement of academic standards by faculty activists.[55]

Another suggests that "anti-American attitudes and professorial abuses of students . . . have metastasized throughout academia."[56] A third finds that *The Professors* provides "documentation that will be hard to refute," and that it shows "the betrayal of our young people by professors who are defiantly unethical and contemptuous of academic standards."[57]

Obviously, those are serious charges. The book consists of short biographies of the 101 professors whom Horowitz and his collaborators labeled "the most dangerous academics in America."[58] Others have refuted some of the specific allegations in the book.[59] In some instances, Horowitz had to admit that he could not prove episodes that he reported in *The Professors*.[60] Some of the professors seem to have made the list because Horowitz disagrees with their ideas, especially their position on the war in Iraq and their support for the Palestinian cause.[61] In other cases, *The Professors* recounts genuinely disturbing information.[62]

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variety of alternative journals and magazines. *See* Wikipedia, http://en.wikipedia.org/wiki/Ward_Churchill (last visited June 14, 2007).

[55] HOROWITZ, *supra* note 1, at i.

[56] *Id.* at ii.

[57] *Id.*

[58] *Id.* at iii. (subtitled "The 101 Most Dangerous Academics in America" and including biographies of 101 professors).

[59] *See Academe*, *supra* note 44.

[60] *See id.* (during the Pennsylvania hearings Horowitz had to admit that he did not have evidence to substantiate two of his prior allegations against faculty members).

[61] *See, e.g.*, HOROWITZ, *supra* note 1 (Professor Laurie Brand, at 74; Professor Lisa Anderson, at 6; Professor Gil Anidjar, at 9; Professor Juan Cole, at 100; Professor Robert Dunkley, at 128; Professor Mark Ensalaco, at 146, among others).

[62] No doubt, most Americans, including academics, would find Professor Ward Churchill's claim that 9/11 victims were "little Eichmanns" deeply troubling. *See* HOROWITZ, *supra* note 1, at vii, xvi-xvii (Churchill wrote after the 9/11 attacks that the horrors of that day were "Americans' just deserts" and was a case of "chickens coming home to roost." *Id.* at xvi-xvii. This statement coincides with a common theme in his writing: "America was like Hitler Germany, a nation dedicated to the extermination of minorities; its capitalist economic machine starving poor people all over the world all the time. Therefore, the 'civilians' who comprised what Churchill referred to as its

One could argue that *The Professors* unfairly excerpts statements out of context and otherwise distorts the work of some of the targeted professors.[63] But even assuming that Horowitz has identified some radical extremists who are inappropriately protected by tenure, I am troubled by the leaps in logic that Horowitz and others on the right make from his observations and empirical studies that they rely on.

The Professors makes a broad indictment of academia. It argues that the 101 profiled professors are representative of faculties generally.[64] It overcomes the obvious problem with a highly selective, unrepresentative sample with two arguments. The first is its reliance on "The Law of Group Polarization"[65] to argue "America's institutions of higher learning have become a haven for extremists."[66] That is, radicals have taken over positions of power and prestige in academia and use that influence

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'technical core'—the inhabitants of the World Trade Center—were little Eichmanns, cogs in a machine that churned out mass murder.") *Id. See also id.* at 234-37 (chapter on Professor Leonard Jeffries, recounting his virulent anti-Semitism; interestingly, the liberal university where Jeffries worked did remove him as chair of his department). Despite instances of offensive conduct by radical leftists, the authors made no effort to examine the many instances of intellectual oppression at conservative institutions. One does not have to look far to find such examples; for example, there is a suppression of modest disagreement with fundamentalist religious tenets at some schools. *See* Thomas Bartlett, *5 Departures on Patrick Henry Faculty Pose Question: Are Christianity and Liberal Arts Contradictory Missions?*, THE CHRONICLE OF HIGHER EDUCATION (May 12, 2006), *available at* http://chronicle.com/daily/2006/05/2006051202n.htm. Conservatives also fail to acknowledge the systematic purging of leftists during the Red Scare of the 1950s. For a brief discussion, see JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 217-38 (2006) (describing conservatives' efforts to compel University of California professors to take a loyalty oath). It is the only systematic effort that I am aware of where one's politics led to dismissal.

[63] For example, *The Professors,* no doubt begun before the dramatic disaffection with the war in Iraq, criticizes Professor David Cole for many positions that Americans now share. An early opponent of the war, Cole used his course on National Security and Civil Liberties to raise questions about "'the respective roles of Congress, the president, and the courts in times of emergency'; 'the targeting of foreign nationals'; and 'preventive detention, surveillance standards, enemy combatants, military tribunals, the role of international tribunals, and regulation of speech and association.'" HOROWITZ, *supra* note 1, at 96. Even if those positions were unpopular when Horowitz and his researchers began their project, anyone reading a newspaper today recognizes that a majority of Americans and many courts now agree with Cole.

[64] HOROWITZ, *supra* note 1, at xxx-xxxii.

[65] *Id.* at xxxiii ("the 'law of group polarization,' . . . holds that if a room is filled with like-minded people, the center of the room will move towards the extreme.")

[66] *Id.* at xxxiii.

to close the door to conservatives.[67] The second and far more troubling argument is its reliance on studies that have found that Democrats outnumber Republicans among reporting faculty.[68] *The Professors* conflates membership in the Democratic Party, liberalism, and extremism.[69]

Horowitz's audience may be predominately conservatives, evidenced by the fact that Regnery published *The Professors*.[70] By comparison, readers may be more inclined to credit the *Georgetown* study. Its authors are not conservative activists like Horowitz,[71] and the *Georgetown Law Journal* is not associated with conservative causes as is Regnery. Further, its authors seem to eschew radical solutions for the overrepresentation of liberals in the legal academy.[72] While the authors of the *Georgetown* study almost certainly were not targeting a conservative audience, Horowitz and conservative bloggers and writers use the study as more evidence of the liberal bias of our academic institutions.[73]

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[67] *Id.* at xxxi.

[68] *Id.* at xxxiii.

[69] *See* HOROWITZ, *supra* note 1. For example, it states, "the last few decades mark the first time in their history that America's institutions of higher learning have become a haven for extremists." *Id.* at xxxiii. Horowitz then explains that conclusion: "A primary cause of this development is the overwhelming prevalence of leftists (and 'liberals') on academic faculties along with the corresponding absence of other, critical, perspectives." *Id.* While Horowitz continues to argue that faculties hold views left of the political spectrum, he fails to clearly acknowledge that the studies he relies on demonstrate only that Democratic faculty members far outnumber Republican faculty members. *Id.* at xxxiii-xxxiv. After several pages, the attentive reader realizes that he has equated being a Democrat with being an extremist.

[70] On its website, Regnery Publishing indicates that its sixty-year history is based on "publishing serious works . . . establishing and sustaining the postwar conservative intellectual movement in America." History of Regnery, http://www.regnery.com/about.html (last visited May 17, 2007) (on file with the *Mississippi Law Journal*).

[71] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1167 n.1.

[72] *Id.* at 1198.

[73] Anne D. Neal, Academic Bias, By the Numbers, FrontPage Magazine (Jan. 20, 2006), http://www.frontpagemag.com/Articles/Read.aspx?GUID={9205869B-7F23-4C1A-AC34-06F3E7248CEF} (on file with the *Mississippi Law Journal*); Adam Liptak, *If the Law Is an Ass, the Law Professor Is a Donkey*, N.Y. TIMES (Aug. 28, 2005), *available at* http://www.studentsforacademicfreedom.org/archive/2005/August/NYTimesLawisaDonkey082905.htm (on file with the *Mississippi Law Journal*); DiscovertheNetworks, http://www.discoverthenetworks.org/guideDesc.asp?type=aca (last visited, Sept. 25, 2006) (on file with the *Mississippi Law Journal*).

The *Georgetown* study explains the importance of its focus on law faculties because law professors, especially at elite schools, are the "gatekeepers and . . . theorists" of America's "aristocrats."[74] The authors suggest that law professors use their influence to move the judiciary to the left on important social issues.[75] The study attempted to gauge the political views of law professors by analyzing "eleven years of political campaign contributions of law professors at the top twenty-one schools as defined by the *U.S. News & World Report* 2002 survey."[76]

The conclusions of the study are not especially surprising. The study defined "'politically active' law professors" as those making a "federal campaign contribution of $200 or more in individual years between 1992 and 2002."[77] By that definition, roughly thirty percent of the faculty at the top twenty-one law schools were politically active.[78] An overwhelming majority (eighty-one percent) contributed to the Democratic Party, with only fifteen percent contributing wholly or mostly to the Republican Party.[79] In addition, the study found that party affiliation also seemed to predict the way in which professors expressed themselves on important legal issues, like President Clinton's impeachment.[80]

The authors focused on full-time faculty only, excluding, for example, adjuncts and retired professors. They justified exclusion of adjuncts because they "do not wield the same influence as full-time professors."[81] They excluded retired professors because many "do less teaching and writing than their active counterparts" and because the authors "wanted to look at the *current* ideological composition of law school faculties."[82]

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[74] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1168 (almost 200 years ago, Alexis de Tocqueville wrote that lawyers are American "aristocrats," and that a law professors' role is to sustain that aristocracy).

[75] *Id.* at 1168-69.

[76] *Id.* at 1169.

[77] *Id.*

[78] *Id.* at 1170.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1173.

Focusing on contributions made the data more accurate than reliance on party affiliation alone.[83] According to the authors, knowing the recipients of professors' contributions enabled them "to make at least tentative judgments about the type of Republicans and Democrats contributing law professors tend to support."[84]

The authors of the *Georgetown* study examined their data by examining trends among subcategories. Thus, they considered gender, minority status, age, and subject areas. They concluded that women were more likely to donate to Democrats than were men, but minority professors' donation patterns were the same as professors' overall patterns.[85] Apparently, one's teaching area did not predict a different pattern either.[86] One finding of interest, not highlighted in the study, is that Post-Baby Boomers "show a less pronounced Democratic affiliation that is statistically significant."[87]

By examining the candidates to whom professors gave money and by relying on ratings from the Americans for Democratic Action and the American Conservative Union, the authors attempted to capture the ideological positions of law professors. The study concluded that "active Democratic law professors tend to give to candidates on the more ideologically liberal side of the Democratic spectrum while politically active Republicans are mixed between ideological conservatives and moderates."[88]

As developed in more detail below, the study's findings do not demonstrate intentional viewpoint discrimination.[89] In addition, even if the findings are valid, critics must point to some

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[83] *Id.* at 1174.

[84] *Id.*

[85] *Id.* at 1180.

[86] *Id.* at 1182.

[87] *Id.* at 1180. The authors downplay the finding's significance because fewer of the younger cohorts are politically active. The authors do acknowledge that "this bit of data, if it does end up reflecting a trend, could be a harbinger of change." *Id.* As developed below, critics of left leaning professors frequently argue that Vietnam-era radicals dominate our universities. Entirely consistent with that view is data suggesting that younger professors are less radical. That reality has significant policy implications, including (even if one were to concede some interest in having more conservative professors) whether the problem is self-correcting. *See infra* note 126.

[88] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1185.

[89] *See infra* note 162 and accompanying text.

harm that results from the predominance of liberals on law faculties. Here, the study identifies a few problems arising from the current composition of law faculties.

The study suggests that professors' involvement in public issues, measured by their willingness to sign joint public statements of issues of public concern, demonstrates that they are motivated by political persuasion.[90] Meanwhile, while signing letters, for example, opposing the impeachment of former President Clinton, professors have attempted to misrepresent their involvement by claiming it to be "an objective expression of apolitical expertise."[91]

The authors argue further that law professors are "in the business of creating a new stock of legal ideas."[92] By comparison to practicing lawyers, professors should "contribute a distinctively independent perspective that would command particular attention and persuasive force."[93] While acknowledging that measuring the extent to which professors' ideology influences their output, the authors give anecdotal evidence that professors' liberal bias effects law reform.[94] Specifically, they file more left leaning amicus briefs and advance similar positions in law reform groups like the American Law Institute.[95] They also cite one instance where a professor's writings have had a marked effect on the development of the law. Some credit Catherine MacKinnon's work on sexual harassment as "largely responsible for creating this area of the law."[96]

The study also argues that professors' views have other more subtle influences on the law. The authors acknowledge that many elites influence judges' views; but "the academy exercises influence on constitutional law . . . through its assessment and reassessment of the reputations of members of the judiciary."[97] That is the result of two factors: one, that professors form their views of justices based on ideology and, two, that

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[90] *See* McGinnis, Schwartz & Tisdell, *supra* note 9. at 1193.
[91] *Id.* at 1191.
[92] *Id.* at 1193.
[93] *Id.*
[94] *Id.* at 1193-94.
[95] *Id.* at 1194-95.
[96] *Id.* at 1195.
[97] *Id.* at 1196.

judges care about their reputations.[98] Justices, at least at the margin, are likely to alter their jurisprudence towards the left to appeal to liberal professors.[99]

The contentions that liberal bias among academics has influenced public policy are difficult to prove. The authors attempted to show more concrete injury as well. In a section of the study that must please critics of the diversity rationale for affirmative action, the authors use those arguments to focus on the cost of liberal bias. As the authors point out, "[t]he viewpoint diversity rationale for race-conscious admissions policies posits that certain underrepresented minorities need to be given greater representation to make sure that all students benefit from exposure to a wide variety of viewpoints."[100] The authors eschew both arguments on either side of the affirmative action debate and in favor of affirmative action for conservatives as a remedy for the lack of viewpoint diversity.[101]

The authors rely on Justice O'Connor's discussion of viewpoint diversity in *Grutter v. Bollinger*[102] and some of the amici curiae briefs submitted (no doubt by liberal left leaning law professors and deans) in *Grutter* to make their case.[103] Thus, Jus-

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[98] *Id.*

[99] *Id.* at 1197.

[100] *Id.* at 1198.

[101] *Id.* Not all commentators have been as judicious as the authors of the *Georgetown* study. *See, e.g.*, David Horowitz, The Campus Blacklist, FrontPage Magazine (April 18, 2003), http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=7357 (on file with the *Mississippi Law Journal*) (encouraging students to "use the language that the left has deployed so effectively on behalf of its own agenda[]," stating "[t]here is a lack of 'intellectual diversity' on college faculties and in academic classrooms," and finding that "the conservative viewpoint is 'under-represented' in the curriculum and on its reading lists. The university should be an 'inclusive' and intellectually 'diverse' community."); Anne Neal, Intellectual Diversity Endangered (Nov. 7, 2003), http://www.cfif.org/htdocs/freedomline/current/guest_commentary/student_right_to_learn.htm (on file with the *Mississippi Law Journal*) (stating that university trustees should "insist that their institutions offer broad-based survey courses . . . conduct intellectual diversity reviews and . . . make the results public," and that hiring, firing and tenure decisions be monitored regularly for instances of political discrimination); Posting to Spartacus Blog, http://spartacus.blogs.com/spartacus/liberal_academic_bias/index.html (Feb. 15, 2004, 15:53 EST) (suggesting "that the same approach taken in the past to remedy racial and gender discrimination in employment (commonly known as 'affirmative action') would be appropriate with regard to political ideology as well").

[102] 539 U.S. 306 (2003).

[103] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1199 n.113 (citing the amicus briefs of the deans at Georgetown University Law Center, Duke Law School, University

tice O'Connor found the benefits of affirmative action to be "important and laudable" because "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[104]

In effect, the authors argue that political affiliation is more indicative of viewpoint diversity than racial and ethnic diversity and, therefore, at least as important as racial and ethnic diversity if *Grutter*'s laudable goals are genuine.[105] The authors argue that political affiliation is about espousing a viewpoint while race and ethnicity are only proxies for different viewpoints.[106] In effect, the presence of African-American students does not guarantee that they will advance any particular positions; having Republicans in class increases the chances that they will argue for "lower levels of government spending, less market regulation, and lower and less progressive taxes . . . [and in opposition to] abortion, affirmative action based on race, and a strict separation between church and state."[107]

They also attempt to rebut the argument that liberal professors can serve as proxies for conservatives because they can adopt conservative positions for the sake of class argument.[108] Their rejoinder is straightforward: one can make the same argument to the claim that we need minority students and professors to represent diverse points of view.[109] Either professors can take on different voices or they cannot; but the argument runs parallel whether the issue is to justify having more minority professors and students or more conservatives.[110]

Whatever role students may play in assuring vital classroom discussion, the presence of conservative students is not a sufficient antidote to the need for conservative voices in law

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of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, New York University Law School, Stanford Law School, Cornell Law School, and Northwestern University School of Law).

[104] *Id.* at 1199 (quoting *Grutter*, 539 U.S. at 330).

[105] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1199-1200.

[106] *Id.*

[107] *Id.* at 1200.

[108] *Id.* at 1201.

[109] *Id.*

[110] *Id.*

school, argue the authors.[111] That is so because "[f]aculties set law school curricula and determine what should be taught in each class."[112] They speak more in class than their students do, and they determine who is invited to campus to give lectures and participate in workshops.[113]

The authors contend that the presence of conservative faculty would benefit liberal professors as well.[114] For example, sharing their work with conservative faculty should sharpen their arguments, making them less insular and increasing their influence outside of the academy.[115] Furthermore, they contend that the increased conservative faculty voice might also result in more objective, less result-oriented scholarship because of the regular exchange of ideas between conservative and liberal colleagues.[116]

The *Georgetown* study makes no claim of intentional discrimination and recognizes that the disparity is likely the result of many factors, including "conservatives' relative enthusiasm for market society."[117] At the same time, a greater number of conservatives would result in less viewpoint discrimination in hiring.[118]

While the authors did not focus on harm to students, they imply that students suffer from a lack of conservative role mod-

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 1202.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1203.

[118] *Id.* The authors also use other arguments used by affirmative action supporters to advance the hiring of more conservatives:

> "[J]ust as those who favor viewpoint diversity for affirmative action argue that it can be pursued without taking unqualified students, it would seem that hiring conservative professors can be accomplished without hiring unqualified professors. Perhaps schools would find that as a proportion of law teachers, there are fewer qualified conservatives than there are qualified law students of different ethnic and racial backgrounds as a proportion of potential law students, but that can hardly be settled unless law schools committed to diversity undertake a rigorous program of outreach. This would include at the very least a program of trying to assure that there are substantial numbers of conservatives and Republicans represented at faculty workshops and as visiting faculty members."

Id.

els.[119] For example, in explaining their decision to exclude adjunct professors from their study, they state that "such teachers do not wield the same influence as full-time professors."[120] Others have argued more forcefully that conservative students experience alienation because of so few conservative voices on campus[121] and are at a disadvantage because the lack of mentors leads to fewer career opportunities.[122]

IV. SKEWING THE DATA

Over the past thirty years, I have taught at five law schools. Anecdotally, the claim that law faculties are far left of center does not compute. No doubt, in general, law faculties may be more liberal than lawyers generally, but Horowitz and his followers' claims are wildly overblown. And while the *Georgetown* study is a much more scholarly and balanced view, it overstates the extent to which law faculties tilt to the left. Closer examination of the authors' methodology suggests ways in which the data are skewed.

The most obvious decision that skewed their data was the exclusion of adjunct and emeriti professors.[123] Furthermore, they did not attempt to distinguish between clinical and research professors.[124] As the authors themselves recognize, their study shows that law professors are more left leaning than the rest of the population generally and Americans with similar in-

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[119] *Id.* at 1201.

[120] *Id.* at 1172-73.

[121] *See, e.g.*, HOROWITZ, *supra* note 1; Cathy Young, The Impact of Academic Bias: Professors Do Lean to the Left—But Are Students Listening? (March 8, 2007), http://www.reason.com/news/show/119026.html (on file with the *Mississippi Law Journal*) ("If a student doesn't subscribe to the campus orthodoxy, the likely effect is . . . to alienate her from intellectual life."); Horowitz & Lehrer, *supra* note 43 (finding that the "the impression that conservative values and ideas aren't welcome on campus is driven home daily to students until it becomes second nature . . . . students . . . will conceal[] what they actually think in order to protect their academic standing").

[122] *See, e.g.*, Horowitz & Lehrer, *supra* note 43 (noting that the "lack of conservative professors . . . serves to reduce the ability of . . . conservative students to pursue graduate study even when they want to. Nearly all distinguished doctoral programs rely on matching students with professors who have compatible interests."); DVD, *supra* note 14 (arguing that the "politics, prejudices and biases" of law school faculty do have an impact on students and their careers).

[123] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1172-73.

[124] *Id.* at 1173.

comes.[125] Adjuncts, drawn from the larger profession, are likely to be more conservative than their full time colleagues. That has certainly been my experience at several law schools. I have not found any systematic data on adjunct professors, but I suspect that Pacific McGeorge School of Law is typical of other law schools. Among our adjuncts are several Republican-appointed judges, district attorneys, lawyers for the conservative Pacific Legal Foundation, victims' rights advocates and members of the California Attorney General's office. Inclusion of emeriti would also likely show law faculties to be less radical than portrayed in the study. If, as critics like Horowitz point out, the swing to the left occurred when radicals from the 1960s entered teaching,[126] emeriti would have come of age in the 1950s and early 1960s and would have been less radical than their junior colleagues. The exclusion of adjuncts may especially have a significant skewing effect because of the large number of adjuncts who teach at most law schools, often outnumbering full-time faculty.[127]

As noted above, the study excluded adjuncts because they "do not wield the same influence as full-time professors."[128] The authors cite no authority for that proposition; and while I have no doubt that students are most heavily influenced by their full-time professors, especially their 1L professors, the decision to exclude them ignores their relevance. Adjuncts are not as likely to publish as are full-time professors and, therefore, are not likely to have a great role in the world of legal scholarship. But insofar as the concern about the absence of conservatives on law

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[125] *Id.* at 1178.

[126] HOROWITZ, *supra* note 1, at ix (stating that many anti-war radicals in the Vietnam era "stayed in school to avoid the military draft and earned Ph.Ds, taking their political activism with them when they became tenured-track professors").

[127] *See, e.g.*, Faculty, Columbia Law School, http://www.law.columbia.edu /Faculty/full_time_fac (last visited Apr. 5, 2007) (listing 78 full time faculty and 171 adjunct faculty); Faculty, University of Pennsylvania Law School, http://www.law.upenn.edu/cf/faculty/ (last visited Apr. 5, 2007) (listing 54 full time faculty and 81 adjunct faculty); Faculty Profiles, Duke Law School, http://www.law.duke.edu/fac/index (last visited Apr. 5, 2007) (listing 51 full time faculty and 94 adjunct faculty); Faculty Profiles, New York University Law School, http://its.law.nyu.edu/faculty/profiles/ (last visited Apr. 5, 2007) (listing 105 full time faculty and 110 adjunct faculty).

[128] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1172-73.

faculties is the need to expose students to a wide variety of views, exclusion of adjuncts is not warranted. Insofar as the concern is the lack of mentors for conservative students, again, the exclusion of adjuncts also portrays the academy inaccurately. The presence of a more conservative group of faculty may address some of the claimed problems with the liberal bias of full-time faculty. Notably, a conservative student unable to find a mentor among full-time professors surely can seek out an adjunct, someone who might be an excellent role model with real standing in the local legal community.[129]

The failure to distinguish between clinical and research professors also tends to raise questions about the study's conclusions. Almost certainly, clinical professors are more left leaning than are research professors.[130] But they also teach fewer students[131] and are less likely to publish than are research professors.[132] As a result, inclusion of clinicians in the

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[129] The authors do not specifically mention the lack of mentors for conservative students as a problem, but it is implied in their insistence that faculty diversity is more important given the significant influence professors have on students. *Id.* at 1201.

[130] Historically, in-house clinical programs developed as part of a social justice agenda. Many clinical professors came from the ranks of legal services and other predominately liberal organizations. *See, e.g.*, Kimberly E. O'Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 CLINICAL L. REV. 335 (2005). *See also* Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL'Y 201, 262 (2006) ("The social history of clinical education in the United States is inextricably bound with the history of lawyering for social justice . . . ."); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 518-19 (1990) ("[M]odern clinical legal education developed in the crucible of the political activism of the 1960's and early 1970's. Many of the proponents of the client-centered approach were former legal services or public interest lawyers who entered academia as clinical law teachers."); Minna J. Kotkin, *The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers*, 4 J.L. & POL'Y 435, 447-48 (1996) (stating that "lawyers staffing these programs were largely drawn from the legal service and public interest community. . . . [I]n-house clinicians generally replicated the service models with which they were accustomed, and designed programs along the lines of their own experiences.").

[131] Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 381 (2001) (stating that the informal student/faculty ratio standard for in-house clinical programs is 8:1). The average student/faculty ratio for law schools from 2001-2007 ranged from 14:1 to 20:1. American Bar Association, http:// www.abanet.org/legaled/statistics/stats.html (last visited May 23, 1007) (on file with the *Mississippi Law Journal*).

[132] *See* Dinerstein, *supra* note 130, at 521 n.94 (stating that the "substantial time and other pressures" on clinicians "militate[s] against production of scholarship"). *See also* Nina W. Tarr, *Current Issues in Clinical Legal Education*, 31 HOW. L.J. 31, 41

study overstates the leftward tilt of law faculties generally. Research professors are more likely than are clinicians to influence students because they teach larger classes. And if the concern is the influence of academics' scholarship,[133] clinicians have less influence than research professors.

The authors also downplay a significant trend that they found in their data. If critics are correct that the tilt to the left is a result of the influx of 1960s radicals into the academy, one would have predicted that younger professors would be less likely to be leftists. Not surprisingly, the *Georgetown* study found that to be the case: "Politically active Post-Baby Boomers show a less pronounced Democratic affiliation that is statistically significant."[134] That finding undercuts claims of discrimination by liberal faculty against conservatives,[135] as well as any demand for remedial measures to correct an imbalance; in fact, the imbalance may correct itself.[136] Despite arguing that their methodology allowed generalizations about faculties as a whole,[137] the authors were surprisingly less confident about their generational finding. That is so because politically active Post-Baby Boomers "make up a much smaller proportion of their cohort than do politically active professors in other cohorts."[138]

Yet another concern about the study's methodology is its focus on only the top twenty law schools.[139] The authors cite an unpublished decade-old study of the top 100 law schools leading to similar findings that about 80% of law professors were Democrats and only 13% were Republicans.[140] A contemporary

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(1993) (stating that some institutions have clinical instructors with "uncertain one-year contracts, no meaningful relationship to, participation in, or responsibilities within the institution").

133 McGinnis, Schwartz & Tisdell, *supra* note 9, at 1193-95.

134 *Id.* at 1180.

135 *See* HOROWITZ, *supra* note 1, at xxxv-xxxvi (stating that there is "considerable reason to believe" that the increase in the ratio of liberals to conservatives on college faculties is a result of political discrimination); *see also* DVD, *supra* note 14.

136 McGinnis, Schwartz & Tisdell, *supra* note 9, at 1199-1200.

137 *Id.* at 1171.

138 *Id.* at 1180.

139 Because of a tie between two schools, the study collected data for twenty-one schools. *Id.* at 1172.

140 *Id.* at 1186.

study of all American law schools might yield results that are less heavily skewed. In recent years, religious institutions have opened law schools with avowedly conservative missions.[141] Other religious institutions, including Brigham Young, Notre Dame, Baylor and Pepperdine, have distinct missions that have tended to favor more conservative faculty.[142] While state schools cannot discriminate based on point of view, religious and other private institutions can and sometimes do. Among secular institutions, George Mason has received ample support from the conservative Olin Foundation[143] and has made its

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[141] *See, e.g.*, About Regent Law, Regent University School of Law, http://www.regent.edu/acad/schlaw/admissions/abouthome.cfm (last visited Apr. 6, 2007) ("The mission of Regent Law School is to bring to bear the will of our Creator, Almighty God, upon legal education and the legal profession."); About STU Law, St. Thomas University School of Law, http://www.stu.edu/about-stu-law-section-353.html (last visited Apr. 6, 2007) ("St. Thomas University is an urban, student-centered, Catholic university with rich cultural and international diversity, dedicated to educating leaders who contribute to the economic and cultural vitality of the regions they serve."); Mission Statement, Ave Maria School of Law, http://www.avemarialaw.edu/prospective/philosophy/phil1.cfm (last visited Apr. 6, 2007) ("Inspired by Pope John Paul II's encyclical *Fides et Ratio*, Ave Maria School of Law offers a distinctive legal education—an education characterized by the harmony of faith and reason."); Our Mission, Liberty University School of Law, http://www.liberty.edu/academics/law/index.cfm?PID=3813 (last visited Apr. 6, 2007) ("Liberty University School of Law exists to equip future leaders in law with a superior legal education in fidelity to the Christian faith expressed through the Holy Scriptures.").

[142] *See* Mission and History, Notre Dame Law School, http://law.nd.edu/prospective_students/academics/mission.html (last visited Apr. 6, 2007) ("[Q]uestions that will always have a central place here include the relationship between law and morality, the distribution of power between the state and other social institutions, and the importance of identifying universal norms of justice and exploring the approaches of diverse cultures in implementing those norms."); Mission Statement, Pepperdine University, http://law.pepperdine.edu/welcome/mission.html (last visited June 11, 2007) ("The school's Christian emphasis leads to a special concern for imbuing students with the highest principles of professional, ethical, and moral responsibility. An effort is made to call together a faculty, staff, and student body who wishes to share this experience of quality legal education in a value-centered context."); Mission Statement, Baylor Law School, http://law.baylor.edu/HTML_site/MissionStatement.html (last visited June 11, 2007) ("As a member of the Baylor University community, the School of Law shares in the University's mission to education men and women by integrating academic excellence and Christian commitment within a caring community."); Mission Statement, Brigham Young University, http://unicomm.byu.edu/president/missionstatement.aspx (last visited June 11, 2007) ("All students at BYU should be taught the truths of the gospel of Jesus Christ. Any education is inadequate which does not emphasize that His is the only name given under heaven whereby mankind can be saved.").

[143] *See* Media Transparency, Recipient Grants: George Mason University, http://www.mediatransparency.org/recipientgrants.php?recipientID=413 (last visited

reputation as an institution with a strong conservative law and economics bias.[144] Some conservative institutions may already be practicing overt viewpoint discrimination, which is, in effect, a form of affirmative action for conservatives.

More fundamentally, studies like the *Georgetown* study find little more than disparity between Democrats and Republicans on law or university faculties. Even if the disparity is significant, it does not establish that law faculties are far to the left of the political center. Critics are too quick to associate party affiliation with radicalism.[145] Some studies, relying on self-reporting of one's political orientation, have found that professors are more centrist than extreme in their views.[146] Further, recent election results demonstrate the wide array of views within the Democratic party, from Blue Dog Democrats in states like Montana,[147] to socially conservative blue collar Democrats, many of whom oppose abortion rights,[148] and to deeply religious African-Americans who oppose much of the liberal social agenda

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Apr. 6, 2007) (on file with the *Mississippi Law Journal*) (listing grants from a number of conservative groups, including the John M. Olin Foundation, Inc.).

144 *See* Ronald Roach, *Unlikely Partners in Philanthropy*, BLACK ISSUES IN HIGHER EDUCATION (Aug. 31, 2001), *available at* http://findarticles.com/p/articles/mi_m0DXK/is_14_18/ai_78537580 (on file with the *Mississippi Law Journal*); *see also* The University of Chicago Law School, Politics and Advocacy: Challenging Conventions, http://www.law.uchicago.edu/alumni/record/politics-advocacy.html (last visited Apr. 6, 2007) (on file with the *Mississippi Law Journal*) (One alumnus challenged the university's conservative reputation saying her experience was quite different.)

145 *See supra* note 69 and accompanying text. *See also* HOROWITZ, *supra* note 1, at xxxiii-xxxiv.

146 JENNIFER A. LINDHOLM, KATALIN SZELÉNYI, SYLVIA HURTADO & WILLIAM S. KORN, THE AMERICAN COLLEGE TEACHER: NATIONAL NORMS FOR THE 2004-2005 HERI FACULTY SURVEY 44 (2005) (indicating that 29.2% of professors characterized themselves as "middle of the road," while only 7.9% characterized themselves as "far left").

147 *See* Blue Dog Members, BlueDogDems.com, http://www.bluedogdems.com/members.html (last visited Apr. 7, 2007) (on file with the *Mississippi Law Journal*) (listing "Blue Dog" members of Congress from a number of red and blue states, including California).

148 *See* Democrats for Life of America, Wikipedia, http://en.wikipedia.org/wiki/Democrats_for_Life_of_America (last visited May 24, 2007) (on file with the *Mississippi Law Journal*) (listing several pro-life Democrats, including thirty-seven members of Congress, four United States Senators, and four governors). *See also* Bob Casey, Jr., Wikipedia, http://en.wikipedia.org/wiki/Bob_Casey%2C_Jr.#Abortion (last visited May 24, 2007) (on file with the *Mississippi Law Journal*) (stating that Democratic senator Bob Casey "is strongly pro-life. He has publicly stated his support for overturning *Roe v.* Wade . . . . He supported the confirmation of both John Roberts and Samuel Alito for seats on the Supreme Court of the United States . . . .").

of the party.[149] While neo-cons have found their home in the Republican Party, the movement has roots in the Democratic Party, dating back to leaders like Washington Senator Henry "Scoop" Jackson, a Civil Rights liberal but defense hawk.[150]

Despite a generally held view that the parties have drifted further left (the Democrats) and right (the Republicans) from the center,[151] a careful study of opinion data rebutted the view that Democrats had moved away from the center.[152] It did find that the recent Republican congressional majority and the Bush administration were ruling far to the right of center.[153] Those data suggest that on substantive issues, Democratic professors may not be far from the views of fellow Americans.

The *Georgetown* study did not effectively rebut that conclusion. The authors did contend that party affiliation measures real differences in attitudes. For example, they "have distinctive differences in views on areas such as minority rights and affirmative action, environmental protection, and social spend-

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[149] *See* The Pew Research Center, Survey: Beyond Red vs. Blue (May 10, 2005), http://people-press.org/reports/pdf/242.pdf (on file with the *Mississippi Law Journal*) (stating that conservative democrats, a group that includes "many blacks and Hispanics," are "quite religious [and] socially conservative").

[150] *See* Wikipedia, The New Republic, http://en.wikipedia.org/wiki/The_New_Republic (last visited Apr. 8, 2007) (on file with the *Mississippi Law Journal*); Wikipedia, Henry M. Jackson, http://en.wikipedia.org/wiki/Henry_M._Jackson (last visited Jan. 7, 2008) (on file with the *Mississippi Law Journal*); Wikipedia, Neoconservatism, http://en.wikipedia.org/wiki/Neoconservatism (last visited Jan. 7, 2008) (on file with the *Mississippi Law Journal*).

[151] *See* JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES 5-7 (2006) "Both parties have used hardball tactics that have polarized Washington . . . . Democrats have been waging a daily war in Washington against the GOP as unrelenting and nearly as virulent as that of their counterparts on the other side of the aisle . . . . [O]nce they arrive, House leaders on both sides go to extraordinary lengths to reinforce the partisan divide . . . . " *Id.*

[152] *See* JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION & THE EROSION OF AMERICAN DEMOCRACY 28-29 (2005) "Democrat activists . . . have moved back to the center in recent years even as Republican activists have strayed sharply from it . . . . In contrast with the common view, partisan polarization in Congress has not been caused by Republicans moving right and Democrats moving left in equal proportion. To the contrary, the rightward shift of the GOP is the main cause of polarization." *Id.*

[153] *See id.* at 28, 34. "The Republican Party in Congress is far more conservative than it was even a quarter century ago . . . . What was once the right wing of the party is now its moderate center. What was once its left flank is all but gone. And what remains is a new, hard-edged conservatism that almost completely defines the goals, operations, and identity of the contemporary Republican Party." *Id.*

ing. Divisions on these issues consistently track party affiliation."[154] But the cited data suggest a significant overlap between Democrats and Republicans: for example, 64% of Democrats and 34% of Republicans favor a public health insurance plan.[155] Even more interesting are Republican views on abortion: while the authors suggest a similar disparity between Democrats and Republicans, other studies found that as many as 70% of Republicans favored abortion rights.[156]

Indeed, abortion rights are emblematic of how difficult it is to stereotype one's views based on party affiliation. Republicans had a majority on the *Roe* Court, with one Republican and one Democrat dissenting.[157] Since the 1980s, Republican presidents have consistently appointed Justices with an eye towards overruling *Roe*.[158] Despite those efforts, Republican Justices have kept it intact.[159] Indeed, many Libertarians, who often vote for Republican candidates, nonetheless favor abortion rights.[160] The Republican Party thus includes social conservatives and economic conservatives, with many of the latter favoring individual rights inconsistent with the party platform.[161] As this

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[154] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1189.

[155] *Id.*

[156] Dale Wilcox, New National Poll: 73 Percent of GOP Supports Choice, May 12, 2004, http://www.religiousconsultation.org/News_Tracker/73_percent_GOP_supports_choice.htm (on file with the *Mississippi Law Journal*). "[T]he Republican Pro-Choice Coalition changed its name to the Republican Majority for Choice to reaffirm the reality that 73% of Republicans believe that the right to choose should be a woman's decision, not the government's." *Id.*

[157] Roe v. Wade, 410 U.S. 179 (1973). The majority in *Roe* consisted of Justices Blackmun, Brennan, Burger, Douglas, Marshall, and Stewart. Justices Rehnquist and White wrote dissenting opinions. *Id.*

[158] *See* Roe v. Wade, Wikipedia, http://en.wikipedia.org/wiki/Roe_v._Wade (last visited Apr. 8, 2007) (describing, in particular, the efforts of President Reagan to overturn *Roe* through appointees).

[159] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) Reagan-Bush appointees Justices Kennedy, O'Conner, and Souter formed a plurality in favor of upholding *Roe*. *Id.*

[160] *See The Pulse: Pro-choice versus pro-life versus . . .*, LP NEWS (July 1998), *available at* http://www.lp.org/lpn/9807-pulse.html (on file with the *Mississippi Law Journal*) (indicating that a plurality of libertarians hold "a firm pro-choice position").

[161] *See* The Pew Research Center, Survey: Beyond Red vs. Blue (May 10, 2005), http://people-press.org/reports/pdf/242.pdf, at 6, 22 (on file with the *Mississippi Law Journal*) (indicating that Republicans with a strongly pro-business stance "are distinguished from other Republican-leaning groups by their relative lack of intensity with

brief discussion suggests, a careful study of bias should use more sensitive data than party affiliation.

Even conceding that law faculties are more liberal than lawyers at large, one does not need to concede that faculties discriminate against candidates based on their point of view. The authors of the *Georgetown* study do not contend that their data show viewpoint discrimination;[162] others, like Horowitz, have done so.[163] But as conservatives have long argued, the absence of a particular group—typically minorities or women—in a work place does not prove discrimination.[164] At a minimum, those contending discrimination should have to demonstrate either that qualified candidates were in the applicant pool and were passed over to create an inference of discrimination,[165] or that schools discriminated against particular candidates because of their political views.[166]

Those claiming that law faculties discriminate do not offer any empirical support, other than to point to the dominance of Democrats on academic faculties.[167] Occasionally, critics offer

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respect to individual or social moral beliefs," and "[t]hey are more libertarian than other Republican-oriented groups").

[162] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1203 ("Our data, of course, do not show discrimination, and undoubtedly many factors, such as conservatives' relative enthusiasm for market society, contribute to the gross ideological imbalance.").

[163] *See* HOROWITZ, *supra* note 1, at xxxv-xxxvi (stating that there is "considerable reason to believe" that the increase in the ratio of liberals to conservatives on college faculties is a result of political discrimination); Posting to Spartacus Blog, http://spartacus.blogs.com/spartacus/liberal_academic_bias/index.html (Feb. 15, 2004, 15:53 EST) (on file with the *Mississippi Law Journal*) (stating that the statistics show widespread discrimination based on ideological beliefs).

[164] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (lack of female veterans alone insufficient to prove discrimination on part of state in creating hiring preferences for veterans); Washington v. Davis, 426 U.S. 229, 238-39 (1976) (lack of black officers alone insufficient to prove discrimination in hiring by police department); *see also* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (study indicating disproportionate number of black persons executed under death penalty not of itself enough to prove discrimination on part of jurors).

[165] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[166] The complainant must show that the constitutionally protected conduct was a *substantial* or *motivating* factor in the school's adverse employment decision. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[167] *See* HOROWITZ, *supra* note 1, at xxxiii–xxxiv (stating that the ratio of faculty members holding views to the left of the political spectrum over those holding conservative views, "strongly suggests" the "systematic exclusion" of the latter). *See also* Schuck, *supra* note 29:

anecdotal evidence of discrimination.[168] Such claims are impossible to access without the facts of individual cases. As discussed below, those on both sides of the debate about viewpoint discrimination would benefit from empirical research, at a minimum, into who is in the applicant pool. The Association of American Law Schools has a registry of applicants interested in teaching positions. That data may allow researchers to determine who is in the applicant pool and who is hired. Less certain is how one could measure the political views of candidates.

A cursory glance at resumes in the AALS directory suggests that a hiring committee bent on discriminating based on point of view would have a difficult time doing so without extending personal interviews. In a distinctly non-scientific study, I examined fifty randomly selected resumes from the most recent AALS directory. I reviewed the resumes with two questions in mind: would I be confident in predicting the candidate's political perspective based solely on material in the resume and

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> What can be done to make professors practice what they preach on diversity? Alas, no easy remedy exists. The tenure system and the lack of mandatory retirement will project existing faculty bias far into the future. Moreover, the elite schools recruit new law teachers mainly from the top ranks of their recent graduates, whose own predominately left-liberal views are fortified by their professors."

Id.

[168] For example, one critic contends that Justice Scalia's former law clerks need not apply for law faculty positions. *See* DVD, *supra* note 14 (stating that former clerks of Justice Scalia or Justice Thomas have "a lot more difficult time getting hired"). Ironically, the Bush administration has made headlines for their discriminatory hiring practices at the Justice Department. *See* Eric Lipton, *Officials Describe Politically Charged Justice Dept.*, S.F. CHRONICLE (May 12, 2007), at A4, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/05/12/MNGIMPQ1251.DTL (on file with the *Mississippi Law Journal*). Elsewhere, critics have suggested that the Federalist Society has had undue influence in securing prestigious clerkships for young conservatives. *See* EDWARD P. LAZARUS, CLOSED CHAMBERS 264 (1998). "The Federalist Society was enormously effective . . . . Membership quickly became a prerequisite for law students seeking clerkships with many Reagan judicial appointees as well as for employment in the upper ranks of the Justice Department and White House." *Id. See also* Amy Bach, *Movin' on Up with the Federalist Society*, THE NATION (Oct. 1, 2001), *available at* http://www.thenation.com/doc/20011001/bach (stating that some judges seek out Federalists: "Judge Michael Luttig on the Court of Appeals for the Fourth Circuit, for example, hires only students with membership in the Federalist Society or comparable credentials on their resumes"). Perhaps, conservatives have gone on the offensive, accusing liberals of discriminatory hiring because of their own experience in attempting to enforce doctrinal conformity.

would I vote to extend an interview to the candidate whose resume I reviewed.

Were I bent on selecting candidates based on political point of view, I would be hard pressed to do so. Virtually none of the resumes included definitive evidence of the candidate's political perspective. In one instance, the candidate's choice of a recognizable left-wing law professor as a reference was suggestive. In addition, the candidate listed published works, available for scrutiny (if I had time and inclination to make the decision based on viewpoint).[169] In another, a candidate worked for the American Civil Liberties Union. In two instances, candidates worked for judges with national reputations. In one instance, the candidate listed other information that seemed to cancel out any inferences of political perspective. For example, the candidate worked for liberal criminal justice agencies, but also had an economics background and a fellowship sponsored by a conservative foundation. In a few instances, one might infer political perspective from the firm for which the candidate worked. But inferring point of view from association with a law firm is a risky business; one needs to ask whether the candidate was naive about the firm's reputation; was she simply trying to get the best experience possible; or did he want to learn how the other side thinks?

Depending on how desperate one felt in weeding through resumes to single out conservatives or liberals, one might make some gross generalizations: are minority candidates more likely to be politically liberal? Can one infer political persuasion from course preferences; thus, can one infer that a person interested in teaching human rights law is more liberal than a candidate who wants to teach business associations? If so, a law school might have difficulty both discriminating based on political perspective and finding capable faculty to teach all of the tradi-

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[169] At least at the early stages, a hiring sub-committee reviewing hundreds of resumes has little time to go beyond the AALS form resume. Some hiring committees do routinely review the scholarship of all the people whom they interview. I am not aware how widespread that practice is. E-mail from Joshua Dressler, Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University, to author (May 23, 2007, 15:43 CST) (on file with the *Mississippi Law Journal*) [hereinafter Dressler E-mail].

tional courses. Can one infer political perspective from state residence? None of the resumes hinted at the candidate's religion unless one inferred that students attending Catholic law schools are also Catholic, not an especially accurate measure.[170] But determining a candidate's religion is a far cry from determining her politics in many cases.

My efforts to find evidence of political perspective based on the paper trail felt like a waste of time. I doubt that many search committee members engage in that kind of discrimination.[171] They must sort through a thousand or so resumes from the AALS in addition to many more direct solicitations. My experience on search committees suggests that committee members make selections based on several criteria having nothing to do with political perspectives. One is dictated by teaching needs of the school. Hence, an intellectual property candidate from a conservative firm is more likely to get an interview than a member of the ACLU with no interest in property law. A second criterion is evidence of scholarly potential, most importantly whether the candidate has written already,[172] and where the candidate published the articles. The third criterion is the candidate's academic record; a fourth is the candidate's work history. A committee's consideration of gender and race may tip the scale towards the left.[173]

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[170] One might try to infer religious affiliation from the candidate's ethnic background. As my own case proves, that can be a risky business. My Italian ancestors were Protestants. When I first entered the teaching market in 1976, I had reasonable success in getting interviews with Catholic law schools, but little success in getting interviews with Baptist schools. I never asked my colleagues at Loyola New Orleans, where I first taught, whether they were surprised and disappointed when they learned that I am not Catholic.

[171] At least at law schools where I have taught, deans have attempted to balance the hiring committee. At McGeorge, the committee usually includes a representative sample of the faculty, including faculty with different political perspectives.

[172] At McGeorge, the hiring committee reads a candidate's scholarship only after we have decided to invite the candidate to campus. Other schools read the scholarship of all candidates whom they agree to interview at the annual Association of American Law Schools' hiring conference. Still other schools read all of the candidate's scholarship before making a decision whether to interview the candidate. Dressler E-mail, *supra* note 169.

[173] Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1450 (citing research stating that of the findings relating to those new professors who are considered successful law school professors, "the most-cited group is 12% female and 28% minority, while the control group

Any real opportunity to discriminate based on political perspective comes once a candidate is on campus. Even then, so many other criteria factor into hiring decisions. Probably the most important are whether the candidate impresses faculty as articulate, capable of teaching effectively, and as a potential colleague. As discussed in more detail below,[174] if, as some literature now suggests, many conservatives score high as authoritarian on personality indices, personality, rather than political perspective, may be more relevant to the rejection of a candidate than her politics.

This discussion of hiring practices hardly proves the absence of discrimination. But it suggests the lengths to which law professors would have to go to discriminate based on political perspective. Given the number of factors relevant to hiring that have nothing to do with political perspective, the discussion does suggest that whatever effect point of view has is marginal.

As developed below, because conservatives may bring pressure to increase their numbers on law faculties, liberals ought to be prepared to rebut the broad claims of their most extreme advocates. The debate about liberal bias would benefit from a carefully designed empirical study of the applicant pool to determine whether law schools are in fact discriminating against conservatives.

Given the absence of that data currently, one can only speculate whether the applicant pool includes a large number of highly qualified conservatives who are passed over for teaching positions. Also, we lack good empirical data showing whether liberal students outperform their conservative counterparts on standardized tests like the SAT and LSAT. Some evidence dealing with psychological differences between liberals and conservatives suggests that liberals should outperform their conservative classmates.[175]

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is 50% female and 16% minority." These results suggest that minorities are more successful and women less successful.).

[174] *See infra* notes 177-81 and accompanying text.

[175] *See infra* notes 179-83 and accompanying text.

The benchmark of success in law school is the ability to make subtle distinctions and to argue alternative positions.[176] That is, a successful student is one who can see both sides of a legal issue. Recent empirical studies suggest that liberals are more adept than are conservatives at recognizing both sides of an argument.[177] For example, New York University Professor John Jost and his co-authors found that conservatives and liberals demonstrate psychological differences.[178] Conservatives show a "'heightened psychological need to manage uncertainty and threat.'"[179] As summarized in a subsequent paper, Jost contends that "conservatives are, on average, more rigid and closed-minded than liberals."[180] Extensive data from eighty-eight studies, compiled over forty-four years from different countries, demonstrates "a clear tendency for conservatives to score higher on measures of dogmatism, intolerance of ambiguity, needs for order, structure, and closure and to be lower in openness to experience and integrative complexity than moderates and liberals."[181] Jost's findings suggest that liberals ought to outperform

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[176] RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999) (Most law school exams are a means of testing a student's ability to find the issues that are raised by the facts and to deal with the facts in the context of varying rules or statutory interpretations that could be applied to that factual scenario. Often this requires making arguments for one interpretation and against another, which may turn on a small factual matter.).

[177] JOHN W. DEAN, CONSERVATIVES WITHOUT CONSCIENCE 27-31 (2006) (discussing social conservatives as being authoritarians, the author indicates that conservatives are unable to recognize the illogical, inconsistent, and contradictory nature of their beliefs and attributes this lack of recognition to authoritarians' underlying psychological nature); John T. Jost, *The End of the End of Ideology*, 61 AMERICAN PSYCHOLOGIST 651, 661 (2006); John T. Jost, Jack Glaser, Arie W. Kruglanski & Frank J. Sulloway, *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOLOGICAL BULLETIN 339 (2003); Transcript of interview between Neil Cavuto and Rush Limbaugh on "Your World" (Feb. 9, 2006), http://www.foxnews.com/story/0,2933,184342,00.html (on file with the *Mississippi Law Journal*) (decrying the move to the center in favor of passionate extremism).

[178] Jost, Glaser, Kruglanski & Sulloway, *supra* note 177 (explaining that the research employed a "meta-analysis" that identified psychological variables that were correlated, positively and negatively, with political conservatism. The studies were conducted on a series of eighty-eight samples conducted over forty-four years that involved 22,818 individual cases in twelve countries.).

[179] DEAN, *supra* note 177, at 30 (citing Dr. John Jost, "Media FAQ's: Answers by John Jost") (Provided to the author by Dr. Jost).

[180] Jost, *supra* note 177, at 661.

[181] *Id.* at 661-62. *See also id.* at 662 (concluding that "much evidence . . . [supports the] . . . rigidity-of-the-right hypothesis . . . and contradicts persistent claims that liberals and conservatives are *equally* rigid and dogmatic").

their conservative colleagues in law school. If so, one would expect that more liberals would outperform more conservative classmates in law school and would be over-represented on law faculties.

In addition to whether liberals outperform conservatives academically, the Jost findings have other implications about hiring. The fact that conservatives are more dogmatic, intolerant of ambiguity, rigid and closed-minded than liberals are may explain why fewer of them are hired than their more open-minded, flexible colleagues. As argued above, many factors influence hiring decisions that have little to do with political perspective. Some, like Horowitz, argue that liberals want to hire liberals because they think alike and so are discriminating based on point of view.[182] But the failure to hire a conservative may result from far more benign considerations. Imagine two candidates, one, inflexible and closed-minded, and another, tolerant of ambiguity and, presumably, of others' ideas. One might choose the latter candidate without regard to her political perspective.[183]

Further, the Jost data suggest yet another reason why many conservatives may not choose to enter the applicant pool. Ideally, law professors should not use their classrooms to indoctrinate, as Horowitz and others have argued.[184] The benchmark of a law professor is the ability to induce discussion focusing on

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[182] *See* HOROWITZ, *supra* note 1, at xxxvi-xli.

[183] Imagine, for a moment, that a hiring committee was considering Antonin Scalia for a teaching position. Committee members might be impressed with his intellect and his credentials, but might raise questions about his temperament. Apart from the contents of his views, would they want him as a colleague? If stories circulated about his performance on the Court are accurate, he has lost support for his views because of his personally demeaning attacks on his colleagues. For example, according to some sources, he lost the support of Justice Kennedy in the abortion cases because of his sharp personal attack on Justice O'Connor. JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 199 (2007) ("Scalia managed to alienate even his ideological sympathizers. His contemptuous attacks on the pragmatic jurisprudence of Justice O'Connor—he said of one of her abortion opinions that it 'cannot be taken seriously'—clearly took its toll . . . . Some scholars have argued that Scalia's relentless personal attacks on O'Connor and Kennedy dissuaded them from overturning *Roe v. Wade*.").

[184] *See* HOROWITZ, *supra* note 1, at xxvi-xxx.

both sides of the legal issue.[185] That kind of exchange is not as enjoyable for a person who is doctrinaire, intolerant of ambiguity, or rigid in her thinking.[186]

Other factors may explain the absence of conservatives in the applicant pool. Some have suggested that conservatives are more interested in financial success than are liberals.[187] At a minimum, the operation of the market may explain why more liberals than conservatives enter the teaching market. Motivated to do "good," many liberals choose lower paying public interest jobs than do conservatives.[188] As a result, liberals can make the transition to teaching without experiencing a financial shock.[189] Conservatives, who tend to value the free market

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[185] *See* Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955 (2005).

[186] Imagine how difficult it would be for Rush Limbaugh to teach in law school. *See* David Folkenflik, Building Bipartisanship? Not Limbaugh's Problem, NPR, Crossing the Divide (Jan. 25, 2007), http://www.npr.org/templates/story/story.php?storyId=7018083 (on file with the *Mississippi Law Journal*) (stating that Limbaugh has no interest in forging compromise and that he prefers heated debate and "trying to persuade people to agree with [him]").

[187] *Cf.* The Pew Research Center, GOP Makes Gains Among the Working Class, While Democrats Hold On to the Union Vote (Aug. 2, 2005), http://people-press.org/commentary/display.php3?AnalysisID=114 (on file with the *Mississippi Law Journal*) (indicating that "the more income a person has, the more likely he or she is to be a Republican, and the less income a person has, the more likely he or she is to be a Democrat").

[188] *See* Posting of Stephen Bainbridge to http://www.stephenbainbridge.com/pundit ry/comments/an_oldie_but_a_goodie_bias_against_conservatives_in_law_school_hiring/ (Aug. 25, 2005) (on file with the *Mississippi Law Journal*) (citing a statement by George Lakoff, a linguistics professor at University of California, Berkeley) ("The disparity in [academic] hiring . . . [is because] '[u]nlike conservatives, [liberals] believe in working for the public good and social justice.'"). *Cf.* Philip E. Crewson, *Public-Service Motivation: Building Empirical Evidence of Incidence and Effect*, 7 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH & THEORY 499, 500 (1997) ("[P]ublic employees have a greater interest in altruistic or ideological goals such as helping others or doing something worthwhile for society and less interest in monetary rewards than do their private-sector counterparts." Assuming that there are more liberals employed in the public sector, it would follow that liberals are more likely to be motivated by altruism than are conservatives.).

[189] Inside Higher Ed, Faculty Salaries Up 3.8% (March 12, 2007), http://www.insidehighereducation.com/news/2007/03/12/cupa (on file with the *Mississippi Law Journal*) (Median salary of Professor of Law ($121,301), Associate Professor of Law ($91,509), Assistant Professor of Law ($78,294)). The median salary of public interest lawyers varies from $36,000 for an entry-level Civil Legal Services Attorney to $73,000 for a local prosecuting attorney with eleven to fifteen years of experience. Press Release, NALP, NALP Publishes New Report on Salaries for Public Sector and Public Interest Attorneys (Sept. 1, 2006), http://www.nalp.org/press/details.php?id=63 (on file

more than do liberals,[190] may not be able to give up the higher paying job that they favor.[191]

I doubt that law faculties tilt nearly as far as critics suggest. Even a serious study like the *Georgetown* study does not prove a significant tilt to the left. Further, even if a tilt exists, the leftward tilt of law faculties does not prove a bias against conservatives, for example, in hiring decisions. The next section explores whether whatever leftward tilt is present in law school has a cost.

V. No Harm, No Foul

If I were convinced that my conservative students are harmed because of liberal bias, I would change sides in the ongoing debate about liberal bias. This section explores why conservative students cannot claim that they are at a disadvantage because of any liberal bias of their professors and why the claims by conservative critics may harm conservative students. Indeed, conservatives have often criticized liberals for fostering the view that women and minorities are victims.[192] The overblown rhetoric of Horowitz and his fellow travelers may have that effect on conservative students.

Right-wing critics have claimed that left-wing professors punish conservative students for their views and that, unless students tow the left-wing line, they receive lower grades.[193]

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with the *Mississippi Law Journal*). The median salary for a first-year associate at a firm with more than 500 attorneys is $125,000; for an eighth-year associate, it is $181,500. Press Release, NALP, Entry-Level Lawyer Salaries Remarkably Stable (Aug. 8, 2005), http://www.nalp.org/press/details.php?id=56 (on file with the *Mississippi Law Journal*).

190 McGinnis, Schwartz & Tisdell, *supra* note 9, at 1203.

191 *See id.* at 1203-04 (ignoring this factor).

192 Michel Feher, *Empowerment Hazards: Affirmative Action, Recovery Psychology, and Identity Politics*, 55 Representations 84, 87 (1996) ("Until as recently as the early 1990s, the Right was very keen to stigmatize what it called the 'victim talk' of its opponents, that is, the self-fashioning of certain groups as society's helpless victims. Primarily associated with the grievances of women and minorities, such a discourse was denounced by its conservative critics as a blatant betrayal of the famously self-reliant American ethos. However, since . . . 1992, many conservative ideologues have seemed less interested in condemning 'victim talk' than in co-opting it . . . . Right-wing leaders thus endeavor to claim the 'benefits' of victimization for their own constituencies.").

193 *See* Anne D. Neal, Academic Bias, By the Numbers, FrontPage Magazine (Jan. 20, 2006), http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=20967 (on file

Those claims seem to be based on students' self evaluation,[194] obviously not a very reliable measurement of bias. In addition, critics can cite remarkably few complaints of grading bias.[195] A recent report rebuts the claim that conservative students are at a disadvantage.

Three co-authors, including lead author Markus Kemmelmeier, a University of Nevada-Reno sociologist, studied top students' politics and grades in the undergraduate setting.[196] The authors found that students tend to choose areas of study based on their politics; for example, liberal students interested in social justice are more likely than their conservative peers to take courses in sociology. Conservative students were more likely to take courses in business and economics.[197] In disciplines attracting liberal students, the authors found no correlation between the grade received and the students' politics.[198] In courses attracting more conservative students, conservative students had a slight, but statistically significant, advantage in grades received.[199]

The authors cautioned against a left-wing attack on professors for conservative bias. Instead, they argued that the gap was small and offered other, more innocuous explanations of the

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with the *Mississippi Law Journal*); Posting of David Horowitz to FrontPage Magazine, http://www.frontpagemag.com/blog/Read.aspx?GUID=4BED8421-7F6E-4761-A296-E64B98921594 (June 19, 2003, 8:55 AM) (on file with the *Mississippi Law Journal*) (citing the case of one ROTC student who failed a course on the Vietnam War after attending class in his uniform and being berated by his professor for being a part of the imperialist enemy—the military).

[194] *See* Jennifer Jacobsen, *Pennsylvania Lawmakers Form Panel to Investigate Claims of Political Bias in College Classrooms*, THE CHRONICLE OF HIGHER EDUCATION (July 7, 2005), *available at* http://chronicle.com/temp/email2.php?id=8SpvrwRYkjkCvxnwfsCcKXrqn4wNC6XB (on file with the *Mississippi Law Journal*) (indicating that only about fifty students made complaints to the legislator and that these complaints were the impetus for the hearings).

[195] *See id.* (stating that the legislator received fifty complaints from among the thousands of students served by the Pennsylvania State System of Higher Education).

[196] Markus Kemmelmeier, Cherry Danielson, & Jay Basten, *What's in a Grade? Academic Success and Political Orientation*, 31 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1386, 1390 (2005) (The study uses "data from a 4-year longitudinal study [to examine] [3,890] students' academic success as a function of conservatism while controlling for a range of predictors of academic success.").

[197] *Id.* at 1391.

[198] *Id.* at 1392.

[199] *Id.* at 1393.

fact that liberal students received lower grades in those courses.[200]

The Kemmelmeier study involved undergraduate disciplines. There, unlike in law school, grading is not anonymous. As a result, a professor knows whose paper or exam she is grading. Bent on consciously or unconsciously punishing her students for political perspectives, she is able to do so. Apparently, that simply does not happen, at least not in the aggregate.[201] And while some instances of bias may exist, I have already discussed different personality traits of liberals and conservatives: given the rigidity of conservative thinkers, if bias takes place, one would expect conservative professors to be more likely to be biased, unconsciously at least, against liberal students.

While Horowitz and others rail against liberal bias against conservative students and colleagues, they ignore proven instances of intolerance, especially at religious institutions. For example, until recently, some schools, like Bob Jones University, employed strict behavioral codes disallowing interracial dating.[202] Elsewhere, reports have surfaced about discipline against faculty for what seem like minor doctrinal disagreements with strict religious codes of their universities.[203] There, punishment is meted out not for misconduct, but legitimate intellectual differences.

Law professors have little opportunity to discriminate based on their students' point of view. Law schools require that

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[200] *Id.* at 1395 (stating that person-environment fit indicates that certain people with certain perspectives fare better in certain academic fields; conservative students may be more likely to aspire to enter conservative job fields and thus be more driven in their school work in those fields; they may feel more at ease with these classes and materials and be more intrinsically engaged).

[201] *Id.* at 1396-97 (acknowledging that bias could happen in individual cases).

[202] Bob Jones University dropped the ban on interracial dating in 2000 in the wake of media scrutiny and political scorn. CNN, Bob Jones University Ends Ban on Interracial Dating (Mar. 4, 2000), http://archives.cnn.com/2000/US/03/04/bob.jones/ (on file with the *Mississippi Law Journal*).

[203] For example, after an incident at Patrick Henry Christian College in which the university president forced a professor to change his speech regarding St. Augustine, nine professors agreed that if one was unfairly reprimanded or dismissed, the other eight would fight that action. Thomas Bartlett, *5 Departures on Patrick Henry Faculty Pose Question: Are Christianity and Liberal Arts Contradictory Missions?*, THE CHRONICLE OF HIGHER EDUCATION (May 12, 2006), *available at* http://chronicle.com/daily/2006/05/2006051202n.htm (on file with the *Mississippi Law Journal*).

professors grade exams anonymously.[204] Even apart from anonymous grading, the structure of most law school examinations limits the likelihood that professors are grading students based on their political perspectives. The typical law school examination does not ask, "Defend the Supreme Court's decisions from *Roe*[205] through *Casey*,"[206] or, "Critique the Supreme Court's recent Fourth Amendment case law," questions that might require students to take a political position contrary to their own.[207] Most law school questions present students with factual hypotheticals with a call of the question that forces them to analyze the facts in light of prevailing precedent. Analyzing the questions does not call upon the students to take a particular political stance, but instead requires students to be familiar with the case law and to be able to analyze it in light of a new set of facts.

Many courses may lend themselves to political debates. Constitutional Law, Criminal Procedure, Torts and Criminal Law readily come to mind. In fact, a professor bent on teaching any particular course from a political perspective may be able to do so. For example, one might be able to infuse even a course like Civil Procedure with politics.[208] Despite that, testing in a

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[204] "ATTICUS FALCON," ESQ., PLANET LAW SCHOOL: WHAT YOU NEED TO KNOW *BEFORE* YOU GO . . . BUT DIDN'T KNOW TO ASK 131 (Fine Print Press 2003) (1998) (indicating that almost all law schools use a blind grading system). Some students believe that anonymous grading is not, in fact, anonymous. Frustrated with that kind of cynicism when I began teaching, I have come to accept it as a fact of law school life. I do point out to my students that those who believe that we know whose exams we are grading requires them to believe two things about law professors: one is that law school faculties are willing to engage in massive fraud; two is that the average law professor is so motivated to "get" students that she risks violating school policies protecting student anonymity.

[205] Roe v. Wade, 410 U.S. 179 (1973).

[206] Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309 (1994).

[207] Arguably, my hypothetical questions would test the students' abilities to see competing legal arguments.

[208] Examples abound. A few examples may suffice: The Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005) (amending 28 U.S.C. §§ 1711-15), nominally a procedural device, was driven by products manufacturers to avoid populist state juries. A case like Erie Railroad Co. v. Tompkins , 304 U.S. 64 (1938), has generated great interest, in part, because of the political stakes in the case. For example, *Erie* can be understood as a reaction to decisions by the conservative Court that overruled populist legislation. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000). Even something as seemingly politically neu-

way that favors liberals over conservatives or vice versa is less likely to occur because of the typical method of testing.

Imagine, for example, the typical final exam in Civil Procedure which includes a question about subject matter jurisdiction. Thus, the fact pattern may involve a plaintiff incorporated in New Jersey and Pennsylvania, with its principal place of business in New Jersey, filing an action in federal court in New Jersey against a defendant incorporated in Pennsylvania, with its principal place of business in Pennsylvania. After a counterclaim, the original plaintiff may seek to join as a third party defendant a partnership with partners in Pennsylvania and New Jersey, while other parties of various states of citizenship attempt to intervene in the action. The call of the question typically asks the students whether the court has subject matter jurisdiction over the various claims and parties. A competent answer must analyze a variety of questions about existing law, including whether the particular jurisdiction follows the majority rule dealing with parties incorporated in multiple districts,[209] or the minority rule (whereby a court considers the corporation of a citizen of the state where the action is filed),[210] whether the various additional claims arise out of the same transaction or occurrence,[211] and whether the would-be intervenor's rights may be impaired if it does not have the right to intervene.[212] Furthermore, competent answers would need to explore whether the various parties can invoke supplemental jurisdiction under 28 U.S.C. §1367(a) and whether supplemental jurisdiction is improper under 28 U.S.C. §1367(b).

A student who spent time inserting politics into the question would almost certainly be wasting her time. The typical examination asks the students to analyze the question under prevailing law. A student does not improve the answer by dis-

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tral as the Federal Rules of Civil Procedure were first advanced by conservative business interests and were only enacted after populists took up the call for simplified procedural rules. *Id.* at 28-31; David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1292-95 (2007).

[209] RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 167-72 (2d ed. 2006).

[210] Majewski v. New York Cent. R.R. Co., 227 F. Supp. 950 (1964).

[211] FED. R. CIV. P. 13(a).

[212] FED. R. CIV. P. 24.

cussing whether supplemental jurisdiction is an appropriate use of federal judicial resources or an unwarranted intrusion into state prerogative.[213]

Less typically, professors ask policy oriented questions. Thus, one might envision an exam that does invite a discussion of policies of federalism and efficiency in the use of diversity and supplemental jurisdiction. But even there, I find it inconceivable that a professor cares where a student comes out on her conclusion if she understands some of the underlying tensions between federalism and efficiency.[214]

The basic method of testing is the same whether the course is more or less emotionally charged. Thus, a typical Criminal Procedure exam follows very much the same pattern as does the Civil Procedure exam. Here is a typical Criminal Procedure question:

> Federal agents lawfully arrested Defendant and took him into custody. There, they gave him his *Miranda* warnings. He first signed the waiver form but then requested counsel. The agents then asked him for his age, birth date and place of birth, address, height, and Social Security number. He responded to all of those questions. (S 1). In addition, they requested a hair sample and indicated that if he did not provide one voluntarily, they would get a court order. He agreed to allow the agents to take a hair sample at a local hospital. The agents accompanied him to the hospital. While awaiting a

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[213] I should clarify that point. If the call of the question is whether the court has subject matter jurisdiction over the claims and parties, a good answer may discuss efficiency if it supports how a court ought to read the statute. Efficiency, after all, is one of the policies that supports supplemental jurisdiction. But to go further to endorse or criticize supplemental jurisdiction because the student thinks that federalism concerns are implicated seems quite far afield. A student might raise questions about the constitutionality of supplemental jurisdiction; but given the lack of meaningful judicial support, such a discussion would be of marginal importance at best.

[214] Imagine a question that asks, "Comment on §1367." A good answer would raise policy considerations, notably efficiency and the utility of allowing a federal judge to decide the federal question part of a case, and federalism concerns, notably that a federal court hears a state law claim with no independent basis of Article III power and does so today only because of the Supreme Court's abandonment of its original and narrow interpretation of pendent claim jurisdiction. *See* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), *overruling* Hurn v. Oursler, 289 U.S. 238 (1933). I doubt that any professor would grade a student's answer based on whether the student endorsed a particular view of the merits, i.e., that a professor would give a higher grade to a student who concluded that §1367 violated the Constitution.

> medical technician to take and label the sample, Defendant began to talk about the crime, (S 2), at which point, the agents requested that he sign another waiver. He did so. After offering a few more details about his crime (S 3), he requested a lawyer and fell silent. The agents sat in silence for awhile. Defendant began talking again and made a full confession. (S 4).

The call of the question requires the students to address the admissibility of the various statements. The analysis requires a thorough understanding of several major Supreme Court cases, including *Edwards v. Arizona*,[215] *Miranda v. Arizona*,[216] *Oregon v. Bradshaw*,[217] *Oregon v. Elstad*,[218] and *Missouri v. Seibert*.[219] An attempt to insert one's political views into the answer would be distracting and would waste time.

On occasion, a professor might ask a policy question or one focusing on the jurisprudence of a particular justice. For example, Joshua Dressler used the following exam questions as a small part of his final exam:

A. Take one United States Supreme Court case considered in this class this semester with which you disagree and:

> 1. Explain what the case holds and the Court's rationale for its holding.
>
> 2. Explain why you believe the Court was wrong. Your answer should also indicate how you would have decided the precise issue before the Court, and why you believe your result is preferable.[220]

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[215] 451 U.S. 477 (1981).

[216] 384 U.S. 436 (1966).

[217] 462 U.S. 1039 (1983).

[218] 470 U.S. 298 (1985).

[219] 542 U.S. 600 (2004).

[220] The cited question was one of three questions and was allocated only thirty minutes. Dressler includes a more traditional fact pattern that is the most common heavily weighted part of my exams. He adds that, on some exams, "I have quoted a paragraph from a law review article and sought their comment on the topic. Of course, I guess those who fear liberals might believe that this would skew in favor of those who give the 'right' (i.e., liberal) answer, but I really don't think it does with me. But, nobody who is cynical would believe that." E-mail from Joshua Dressler, Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University, to author (Jan. 7,

While Dressler's short essay questions may invite a political harangue, successful students must demonstrate thorough familiarity with the cases and their holdings. Furthermore, the questions invite precise analysis, not just political broadside. In addition to these policy oriented questions, Dressler includes traditional questions as well.[221]

Some students complain that classroom discussions have little to do with what professors test on their exams.[222] If that is the case, it may be because a professor spends too much time discussing students' perspectives.[223] In fact, many critics of the Socratic Method and law school generally urge that law professors allow their students to voice their personal opinions without the professor seriously challenging those views.[224] And yet, when it comes time to write final exams, professors almost certainly fall back on traditional, and appropriate, testing methods that focus on issue spotting and analysis, not on advocating for a political position.[225]

Critics of liberal bias can point to no empirical evidence to support their conclusion that conservative students are punished because of their political views. Further, anonymous grading and the typical exam format severely limit the possibility of using political perspective as a measure of academic success. No doubt, some conservative students contend that their

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2008, 16:03 CST) (on file with the *Mississippi Law Journal*) [hereinafter Dressler E-mail, II].

[221] Insofar as these questions invite answers based on politics, defining "liberal" and "conservative" views in Criminal Procedure is a tricky business. Many libertarians, conservative on economic issues, are interested in restraining the exercise of state and federal power and may side with liberals on Fourth, Fifth and Sixth Amendment issues. In an e-mail exchange, Dressler made a similar point: "One of the 'lessons' I offer on Day 1 of the class each semester is for them to realize that justices rarely can be labeled simplistically as 'liberal' or 'conservative' or even 'pro-defendant' or 'pro-law enforcement,' but rather that justices will have a more or less sophisticated view of constitutional interpretation and/or of a reading of particular constitutional provisions." *See* Dressler E-mail II, *supra* note 220.

[222] FALCON, *supra* note 204, at 115.

[223] Vitiello, *supra* note 185, at 995-1004.

[224] *See id.* (Many argue that the Socratic Method causes moral numbing and the possibility of loss of moral bearings in students when they are forced to take positions opposite their own beliefs.).

[225] *See* FALCON, *supra* note 204, at 107 (indicating that, among professors who teach the same subject matter, there is substantial overlap regarding what material is tested).

political perspective resulted in their poor performance.[226] But both liberal and conservative law students who perform poorly may explain away their performance by looking for excuses.[227]

The authors of the *Georgetown* study suggest that the absence of conservative faculty may harm conservative students because students lack mentors.[228] Even on the assumption that students are more conservative than their professors,[229] the *Georgetown* study indicates that most faculties include some conservative members.[230] They are, after all, merely demonstrating under-representation at most of the elite schools, not the absence of conservatives.[231] As a result, most faculties will include some conservatives to whom conservative students may flock if they feel that they can receive mentoring only from conservative professors. In addition, by excluding adjuncts, the *Georgetown* study excludes a large pool of likely conservative mentors and often an especially impressive group. Accomplished practitioners and judges serving as adjuncts can do more than write glowing letters of recommendation for their

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[226] *See Academe*, *supra* note 44 ("Of the 50 complaints that [the initiating legislator] received, [his opposition] says the majority are anonymous and come from the Web site of Students for Academic Freedom . . . .").

[227] Paul A. Trout, *Shame on You*, THE CHRONICLE REVIEW, November 3, 2006 (arguing that when students are shamed or embarrassed by their professor either because of the grade received or a statement in class, the student will react by "try[ing] to shame his shamer"). *See also* FALCON, *supra* note 204, at 115.

[228] *Cf.* McGinnis, Schwartz & Tisdell, *supra* note 9, at 1201, (stating that faculty diversity is even more important than student diversity because they set the curricula and bring opportunities of academic growth to campus to benefit the students, as well as provide connections for students in their clerkships). The authors thus provide examples of how the faculty can affect the opportunities open to students at a given law school. *Id.*

[229] *Cf. id.* at 1180 (indicating that Post-Baby Boomers tend to be more conservative than Baby Boomers, thus implying that law professors, many from the Baby Boomer generation, are more liberal than their Post-Baby Boomer students. *Contra* UCSC Institutional Research (2003), http://planning.ucsc.edu/irps/Enrollmt/FRESH02/CIRP2002%20Alternate.pdf (on file with the *Mississippi Law Journal*) (In comparing data collected every four years since 1986, the research showed that nationally, and at UC Santa Cruz, students have "moved towards increasingly liberal social attitudes," except for the continued legalization of abortion. The other measures included the legalization of marijuana, abolishment of the death penalty and the prohibition of homosexuality.).

[230] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1170, 1177 (stating that while the contributions are mostly Democratic, 15% are Republican).

[231] *Id.* at 1177 ("At Yale-arguably the nation's leading law school-over 40% of all professors made political contributions . . . with the ratio of Democratic to Republican donors being approximately twenty to one.").

students; they can hire them.[232] The *Georgetown* study also found that younger faculty tended to be more conservative than their older colleagues.[233] Almost certainly, students seek out younger faculty of all political stripes more readily than they seek out older faculty. Furthermore, the absence of mentors for conservative students assumes that liberal professors are unwilling to mentor conservative students. That is a highly questionable assumption. In fact, if, as an increasing body of empirical data suggest, liberals are more accepting and open-minded than are conservatives, conservative students ought to be able to find mentors without difficulty.[234]

Insofar as liberal professors demonstrate their bias in the classroom,[235] one wonders whether that leads to any identifiable harm. As Judge Posner has observed, students may simply turn off their professors' ideas if the students disagree with them.[236]

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[232] Among the adjunct professors at University of the Pacific McGeorge School of Law are successful private practitioners, deputy district attorneys and attorneys general, general counsel for the Pacific Legal Foundation and for the California Department of Education, judges, associate justices, administrative judges, Deputy Executive Director of the California State Bar, and Supreme Court Justice Kennedy. University of the Pacific McGeorge School of Law, Academics, Faculty, http://www.mcgeorge.edu/x186.xml (last visited Nov. 1, 2007).

[233] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1180.

[234] By contrast to undergraduate schools where student-faculty ratios allow a good deal of interaction between students and their professors, law schools often have high ratios. In addition, first year classes are often large. Further, 1L students, often intimidated by their professors, do not seek out their professors as readily as undergraduates do. As a result, many law students do not seek out or develop mentors among their professors.

[235] Some critics, like Horowitz, make that claim. *See* HOROWITZ, *supra* note 1, at xlvii (stating that "many conservative students . . . are singled out today" and activist professors have become "adversaries" of conservative students); *see also* FALCON, *supra* note 204, at 44 (stating that liberal and conservative faculty sometimes use the classroom to espouse their own political views). The claims are at best anecdotal, and at least in law school where the Socratic Method is still used widely, professors have less opportunity to indoctrinate their students. For a study regarding the use of the Socratic Method in law school, see Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996) (discussing the results of a survey in which 97% of the professors who responded indicated that they "used the Socratic method at least some of the time in first year classes").

[236] *See* Liptak, *supra* note 73 (quoting Judge Richard A. Posner) ("I don't think the liberal bias of law school faculties has much impact on the students . . . Law students are careerists, and for them law school is career preparation, not Sunday chapel"); Jennifer Jacobson, *Students May Tune Out Professors of Opposing Political Views, Scholars Tell Pennsylvania Panel*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 23, 2006), *available at* http://chronicle.com/daily/2006/03/2006032302n.htm (on file with the *Mississippi*

I doubt that many professors spend much time in their classrooms simply spouting or letting students spout their political views without forcing that those views be substantiated. Further, as I have argued elsewhere, most of what ought to go on in class focuses not on personal opinion but on court holdings, analysis and policy.[237]

Perhaps conservative students feel aggrieved because they are forced to argue liberal positions in their classes. Some critics of traditional legal education have argued that students become morally numbed and cynical because of legal education. As one commentator has written:

> [Students] learn to suppress their feelings and come to care less about others. They learn that their value systems are irrelevant. "[T]he underlying highest value taught, even if implicitly, is the ability to come up with convincing reasons in support of any argument, whether one personally agrees with them or not, and to defend those reasons with cogent and convincing logic, on behalf of anybody"—a process that may lead to a moral neutering of the students.[238]

On this view, the effect of having too many liberal professors is not just that students might shift to the left but that conservative students will experience moral numbing.

Elsewhere, I have argued that this kind of challenge to one's ideas is a necessary and positive element of a legal education.[239] Law students are adults and part of the psychological development from their teens to their twenties is the abandonment of simplistic views of the world.[240] As uncomfortable as students may find the challenge, forcing students to understand competing legal arguments is essential to the successful practice

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Law Journal) (quoting April Kelly-Woessner, Assistant Professor of Public Policy at Pennsylvania State University at Harrisburg) (stating that students may "tune out" professors who overtly express their political ideology in the classroom and they therefore may not be the "sponges that some people have suggested").

[237] Vitiello, *supra* note 185, at 1000-03.

[238] Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 529 (1998) (quoting WALT BACHMAN, LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION 56 (1995)).

[239] Vitiello, *supra* note 185, at 995-1002.

[240] *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1414 (1997).

of law. An effective advocate must be able to anticipate and rebut her opponent's arguments or she will constantly be blindsided by her opponent.[241] Professor Jeffrey Rosen's recent book on the Supreme Court includes the following discussion of Chief Justice Roberts' views:

> As an advocate, Roberts prided himself for having represented both sides of an issue—liberals and conservatives, government and industry—and this increased his belief in the importance of a bipartisan vision of law. "I do think it's extremely valuable for people to be on both sides . . . . It does give you a perspective that you just can't get any other way, in terms of what the concerns of the other side really are. And it also gives you an added credibility, and that's very, very important."[242]

The lesson is clear: students ought to applaud professors for challenging their views, rather than complaining about not having their own views given sufficient weight.[243]

If law school faculties show an unacceptable tilt to the left, conservative students can vote with their feet as well. As mentioned above, some schools have a distinct conservative bias in their hiring of faculty. Some of those schools are highly ranked.[244] Were there large numbers of highly qualified conservative students disgruntled with the liberal bias of their law professors, presumably the market would have solved the problem: conservative students would apply to schools with more conservative faculties, raising the credential levels of those schools, resulting in increased rankings of those schools in national ranking systems like the *U.S. News & World Report* rank-

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[241] Vitiello, *supra* note 185, at 998-99.

[242] ROSEN, *supra* note 183, at 230.

[243] Of course, this is precisely why many liberal professors challenge their liberal students as well.

[244] *See, e.g., America's Best Graduate Schools 2008*, U.S. NEWS AND WORLD REPORT, *available at* http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php, at 44-45 (ranking Notre Dame 28th, Brigham Young 44th, and Pepperdine 66th out of 184 accredited law schools). Further, a 2007 survey ranked Pepperdine among the 25 most underrated law schools in the country. Vault.com, Most Underrated Law Schools: National Ranking 2007, http://www.vault.com/lawschool/underrated/ (last visited May 29, 2007).

ing of law schools.[245] Little evidence exists that conservatives with high credentials are flocking to elite conservative schools.[246] While conservatives are usually enthusiastic about the free market, they seem blind to the fact that conservative consumers of legal education have plenty of choices. Instead, they seem to assume that some artificial correction be imposed, in Horowitz's case, by state legislatures or Congress.[247] The authors of the *Georgetown* study are more judicious and avoid arguing in favor of affirmative action for conservative faculty,[248] but still suggest greater outreach to expand the pool of conservative faculty.[249]

To date, data suggest that conservative students are almost as satisfied with their law school experience as are other students.[250] But critics like Horowitz and, to a lesser extent, the authors of the *Georgetown* study, run the risk that their claims will harm conservative students. Inviting conservative students to believe that law schools are dominated by a liberal bias that silences conservative voices does all of us a disservice. The criticism is unfair to conscientious liberals who take seriously our obligation to educate all of our students. It is also unfair to conservative students.

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[245] *U.S. News & World Report* considers credentials of incoming students as a major factor in its ranking of American law schools. *America's Best Graduate Schools, supra* note 244 at 16, 45.

[246] According to a 2006 study by the Law School Admission Council, only 2.7% of self-identified politically conservative students indicated that their affiliation with this group played an important role in their decision to attend their current law school. *See Law School Admission Council, The Climate in Law Schools for GLBT Persons: Results from a Survey of Law Students* (April 2006) *available at* http://www.lsac.org/pdfs/2006-2007/GLBT-Climate-Survey.pdf, at 8 [hereinafter LSAC STUDY].

[247] *See* Academic Bill of Rights and Student Bill of Rights, *supra* note 39 and accompanying text.

[248] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1198, 1203.

[249] *Id.* at 1203.

[250] LSAC STUDY, *supra* note 246, at 10 (stating that results of a survey indicate "an overall high degree of satisfaction with law school and with individuals' choices of which law schools to attend . . . . "). Respondents described their law schools as "fairly hospitable" to all groups, although the perceived climate for conservative students was slightly less hospitable than for liberal students. *Id.* at 9. Further, 4.6% of conservatives reported experiencing discrimination compared to 3.3% of liberal students. *Id.* Presumably, these statistics show that conservatives are slightly less satisfied with their law school experience.

For some time, conservatives have accused liberals of making minorities and women into victims.[251] In the area of race, it holds that society, including black leaders and white liberals, has advanced a variety of myths about the oppression of African-Americans.[252] "Victimology" focuses on the role of society in causing poor performance among African-Americans.[253] The effect has been the perpetuation of poor performance, for example, by African-American students. On this view, African-American students "do so poorly in school decade after decade not because of racism, funding, class parental education, etc., but because of a virus of Anti-intellectualism that infects the black community."[254] "Victimology" is a "major obstacle[] to black advancement."[255] It prevents the "victims" from accepting responsibility for their own success and allows them to blame others for their performance.[256]

Conservatives make similar claims about liberal-feminists. For example, in *Who Stole Feminism: How Women Have Betrayed Women*, Christina Hoff Sommers characterized one branch of feminism as "gender-feminists," who blame men for their lack of opportunities. Sommers contends that gender-

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[251] *See* JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 238-41 (2000) (claiming that the liberal proponents of affirmative action "dehumanize" African-Americans and are "operating according to the Victimologist perspective"). Another conservative group, The Network for Enlightened Women (NEW), challenges the ideals of "radical" liberal feminists and claims these feminists promote victimization. Network for Enlightened Women (NEW), http://www.enlightenedwomen.org/home.htm (last visited June 1, 2007) (on file with the *Mississippi Law Journal*); Kathleen Bracken, Secretary of NEW, *Teaching Intellectual Tyranny*, THE CAVALIER DAILY (Mar. 14, 2007), *available at* http://www.cavalierdaily.com/CVArticle.asp?ID=29632&pid=1560 (on file with the *Mississippi Law Journal*) ("According to the radical feminist thought supported in women and gender studies, I am unknowingly a victim of a patriarchal society and completely misled by societal norms."). *See also* CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM: HOW WOMEN HAVE BETRAYED WOMEN 134 (1994) ("A befuddled liberalism has proved to be fertile soil for the growth of an intolerant gender feminism.").

[252] *See* MCWHORTER, *supra* note 251, at 8-25 (describing and rebutting seven "outright myths or vast exaggerations and distortions, born . . . through the prism of Victimology").

[253] *See id.* at 1-49.

[254] *Id.* at 83.

[255] Lino A. Graglia, *Do Racial Preferences Cause Rather than Remedy the Black Academic-Performance Gap?*, 80 TEX. L. REV. 933, 944 (2002) (reviewing JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2000)).

[256] *Graglia*, *supra* note 255 at 942.

feminists "disempower" themselves, the antithesis of what feminism is about.[257]

Horowitz and other conservatives routinely criticize liberals for making minorities and women into victims.[258] And yet they stoke the fears of conservative students that they are the victims of their liberal professors.[259] Certainly, there is more than a touch of irony in this state of affairs. Perhaps the extravagant claims by right-wing critics that liberal professors are biased against them have already resulted in some of the greater dissatisfaction felt by conservative students than their more liberal counterparts.[260]

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[257] *See* HOFF SOMMERS, *supra* note 251, at 16 (stating that American feminism is currently dominated by "gender feminists" who "seek to persuade the public that American women are not the free creatures we think we are" and that "our society is best described as a patriarchy, a 'male hegemony,' . . . in which the dominant gender works to keep women cowering and submissive"). Sommers, whose ideas run contrary to the views of many liberal feminists, works for a conservative/libertarian think tank. Christina Hoff Sommers, Wikipedia, http://en.wikipedia.org/wiki/Christina_Hoff_Sommers (last visited June 1, 2007) (on file with the *Mississippi Law Journal*). Additionally, many of her books have been subsidized in part by conservative groups. *Id.*

[258] *See* HOROWITZ, *supra* note 1, at 372 ("[T]he source of the radicals' power was their willingness to deploy the weapon of victimhood to stigmatize and silence their intellectual opposition."); Feher, *supra* note 192 and accompanying text; Network for Enlightened Women (NEW), http://www.enlightenedwomen.org/home.htm (last visited June 1, 2007). NEW is a conservative women's organization that challenges "radical" liberal feminist ideals and claims that such groups promote victimization of women. *See* Kathleen Bracken, Secretary of NEW, *Teaching Intellectual Tyranny*, THE CAVALIER DAILY (Mar. 14, 2007), *available at* http://www.cavalierdaily.com/CVArticle.asp?ID=29632&pid=1560 ("According to the radical feminist thought supported in women and gender studies, I am unknowingly a victim of a patriarchal society and completely misled by societal norms."); *see also* HOFF SOMMERS, *supra* note 251, at 134 ("A befuddled liberalism has proved to be fertile soil for the growth of an intolerant gender feminism.").

[259] *See* HOROWITZ, *supra* note 1, at xxvii ("[Teachers] must not seek the arbitrary imposition of personal opinions and prejudices on students, enforced through the power of the grading process and the authority of the institutions they represent."). Horowitz goes on to claim that the "lack of professionalism" by liberal activist professors has a negative impact on students. *Id.* at xlv. He also states that "many conservative students . . . are singled out today," and activist professors have become "adversaries" of conservative students. *Id.* at xlvii.

[260] LSAC STUDY, *supra* note 246, at 9 (stating that the perceived climate at law schools for conservative students was slightly less hospitable than for liberal students, and that a higher percentage of conservatives reported experiencing discrimination than did liberals). Some of this dissatisfaction may be due, in part, to the relaxed admission standards for wealthy, often conservative, "legacy children." *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND

Absent some showing of harm to conservative students, we ought to be quite dubious about altering current hiring practices.[261] Apart from the odd spectacle of conservatives advocating for something akin to affirmative action for conservatives, one can imagine odd scenarios playing out in hiring. Which conservative points of view must a faculty consider in hiring? Given that a faculty may have many liberals who share some values of individual freedom with libertarians, should that school hire only social and religious conservatives to give the requisite balance? In assessing hiring needs, should a school canvass the faculty views on issues of the day to determine if a sufficiently broad spectrum of views is present to allow diverse points of view? Thus, if a faculty finds too many anti-war liberals on the faculty, it would press to hire some pro-war advocates? Or should it simply seek to achieve balance among the major political parties? What happens if a faculty hires a candidate to fill one of its conservative seats, but the candidate then switches party affiliation before or after promotion?

One can easily imagine other problems that might arise. Should a law school be compelled to hire a Christian fundamentalist who thinks that homosexuality is an abomination? What if that is a primary focus of her scholarship, a point of view harmful to the school's reputation and hurtful to members of the student body? Should a southern law school be compelled to hire a scholar who thinks that *Brown v. Board of Education*[262] was wrongly decided, even if that school is trying to overcome a reputation and history of racial discrimination?

One commentator has suggested that Republican women are the least represented group on law faculties.[263] Many Re-

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PRINCETON 629-30 n.149 (2005). Certainly the law school experience differs for those lacking the credentials to legitimately compete.

[261] To their credit, the authors of the *Georgetown* study do not advocate radical solutions; no doubt they are sensitive to the claim that they would be advocating affirmative action for conservatives. Instead, their recommendations are relatively modest. McGinnis, Schwartz & Tisdell, *supra* note 9, at 1203 (suggesting instead that law schools try to "assure that there are substantial numbers of conservatives and Republicans represented at faculty workshops and as visiting faculty members").

[262] 347 U.S. 483 (1954).

[263] *See* McGinnis, Schwartz & Tisdell, *supra* note 9, at 1179 ("[P]olitically active female professors are substantially more Democratic than their male counterparts.").

publican women, as many Republican men,[264] come from wealthy families and may have been the beneficiaries of affirmative action already in the form of legacy admissions at prestigious schools.[265] Surely, making them the special target of hiring does not make a compelling case.[266] Going down the road towards correcting the under-representation of conservatives seems a poor step to take.

As argued above, I do not believe that conservative critics have made their case. As a result, I do not think that we need to start struggling with the remedy to an overblown problem, one that may be moderating over time anyway.[267] That is especially true because conservative students cannot seriously contend that they are the victims of liberal bias.

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[264] George W. Bush, for example, gained admission to Yale although he was a "mediocre student" with a verbal SAT score that placed him at the bottom 10% of the freshman class. KARABEL, *supra* note 260, at 344-45 (suggesting that his admission was due to the wealth, prestige and connections of his family).

[265] *See* KARABEL, *supra* note 260, at 629-30 n.149 (relying on figures provided by the Office of Institutional Research at Yale) ("George W. Bush was not alone in receiving preference in 1964; the admission rate that year for legacy applicants was 47 percent compared to 27 percent for nonlegacy applicants."). According to a recent study by the Pew Research Center, "the more income a person has, the more likely he or she is to be a Republican, and the less income a person has, the more likely he or she is to be a Democrat." The Pew Research Center, GOP Makes Gains Among the Working Class, While Democrats Hold On to the Union Vote (Aug. 2, 2005), http://people-press.org/commentary/display.php3?AnalysisID=114 (on file with the *Mississippi Law Journal*) (based on an analysis of 129 surveys with more than 200,000 respondents conducted since 1992).

[266] In upholding the constitutionality of race-conscious admissions in universities, the Court in *Grutter v. Bollinger* discussed the importance of looking to the background of students in the admissions decisions. 539 U.S. 306, 338 (2003). Historical inequality, as well as modern-day racial discrimination, leads to fewer educational opportunities for many minority students. As the Court stated: "By virtue of our Nation's struggle with racial inequality, such students are less likely to be admitted in meaningful numbers on criteria that ignore those experiences." *Id.* "[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities." *Id.* at 346 (Ginsburg, J., concurring). Wealthy Republicans certainly cannot claim such disadvantage. *See also* DeFunis v. Odegaard, 416 U.S. 312, 331 (1974) (Douglas, dissenting) (stating that law schools should consider economic disadvantage in the admissions process).

[267] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1180 (indicating that Baby-Boomers are more liberal than younger faculty, and that this "yields some possible indications of future changes in the ideological composition of the legal academy.").

VI. THE UNDUE INFLUENCE OF LIBERAL PROFESSORS

The authors of the *Georgetown* study did not rest their case on harm to students. Instead, they suggested that law schools should increase intellectual diversity, in part, because of the influence that law professors have on the development of the law. For example, they argued that law professors are "in the business of creating a new stock of legal ideas."[268] Unlike practicing lawyers, professors should "contribute a distinctively independent perspective that would command particular attention and persuasive force."[269]

The study also argues that professors' views have other more subtle influences on the law. For example, they contend that "the academy exercises influence on constitutional law . . . through its assessment and reassessment of the reputations of members of the judiciary."[270] That is the result of two factors; one, that professors form their views of Justices based on ideology and two, that judges care about their reputations.[271] Justices may alter their jurisprudence towards the left to appeal to liberal professors.[272] Because of professors' special role in influencing the law, the argument goes, conservatives deserve to have their voices heard as well.[273]

The occasional law professor may influence the direction of the law. The authors of the *Georgetown* study cite Catherine MacKinnon's work on sexual harassment as "largely responsible

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[268] *Id.* at 1193.

[269] *Id.* Not surprisingly, the authors do not have empirical evidence to measure the influence that law professors have on the development of the law. Such data would be hard to produce. They do give anecdotal evidence that professors' liberal bias effects law reform. For example, liberal professors file more left leaning amicus briefs and advance similar positions in law reform groups like the American Law Institute. *Id.* at 1193-95.

[270] *Id.* at 1196.

[271] *Id.*

[272] *Id.* at 1197-98.

[273] *See* DVD, *supra* note 14 (stating that liberal law faculties will "influence a generation of lawyers," thus greatly impacting society). Dean Cass further contends that liberal bias is a "danger" and a "problem" that needs to be eliminated. *Id.* According to the authors of the *Georgetown* study, society would benefit from ideological diversity at law schools. McGinnis, Schwartz & Tisdell, *supra* note 9, at 1194, 1202 ("[M]ultiple conflicting perspectives provide . . . society with a public good—the vetting of both sides of an important legal issue from its most sophisticated academic theorists . . . . Ideological diversity might also improve a law school's contribution to public discourse—one of the principal public goods that law schools provide to society at large.").

for creating this area of the law."[274] Laurence Tribe's string of victories before the Supreme Court suggests a high level of respect for his work.[275] No doubt, other examples exist.[276]

But the idea that left leaning academics have a major impact on the development of the law (one that is so skewed that it is in need of an artificial correction) seems odd. Several factors suggest that legal academics have little overall influence on the direction of the law.

One recent study found that judges cite academic scholarship far less than they did in the past.[277] Some critics suggest that the reason is both the style and content of that scholarship.[278] Others contend that law schools stopped hiring experienced lawyers and have hired inexperienced lawyers with advanced degrees, who do research in increasingly esoteric areas having no utility to practicing lawyers.[279] Highly theoretical

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[274] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1195.

[275] Between 1981 and 2005, Tribe won seventeen cases in front of the United States Supreme Court, including a span of seven in a row in the early 1980s. *Laurence Tribe*, Wikipedia, http://en.wikipedia.org/wiki/Laurence_Tribe (last visited June 5, 2007) (on file with the *Mississippi Law Journal*).

[276] A number of scholars have acknowledged the influence of Professor Anthony Amersterdam's work. *See, e.g.*, WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 208 (2006) ("Following the example of Anthony Amsterdam in the pre-*Furman* era, defense attorneys have transformed our understanding of the modern system of capital punishment, identifying fundamental problems with the way it operates.").

[277] Trends in Federal Judicial Citations and Law Review Articles, Roundtable Discussion: Court of Appeals for the Second Circuit, Benjamin N. Cardozo School of Law (Mar. 8, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf, at 1. For example, in the 1970s, federal courts cited the Harvard Law Review 4,410 times; in the 1990s, the number of citations dropped by more than half, to 1,956; so far this decade it has only been cited 937 times. *Id* at 6.

[278] LASSON, *supra* note 8, at 29-30 (quoting Yale law professor Fred Rodell) ("[T]here are two things wrong with . . . legal writing: 'One is its style. The other is its content.'").

[279] *See* Roundtable Discussion, *supra* note 277, at 1 ("Judges and commentators have noted a change in law review scholarship over the past decades. They contend that articles have become increasingly theoretical, branching outside of the traditional legal boundaries, and as a result are increasingly irrelevant tools for the practical work of arguing and deciding cases."); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 894 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 882, 883 (May 4, 2007) ("Law schools traditionally emphasize theoretical scholarship and the teaching of legal theory, and many hire and reward faculty primarily based on scholarly potential and production.").

scholarship may influence tenure decisions,[280] but is not likely to assist judges.[281]

Other trends have lessened the influence of academic lawyers. In *Punishment and Democracy: Three Strikes and You're Out in California*, the authors lament the loss of influence of academic lawyers. According to the authors, "[P]art of the problem is that most academic lawyers are not much interested in criminal justice policy processes. Most of the problem is that there is no demand for what experts have to offer, which is information about the implications and consequences of policy choices."[282] They trace the problem to the public's loss of confidence in government and the academy, part of the populism of the 1970s.[283]

Indeed, both the left and the right have attacked experts. Postmodern theory has challenged the interpretation of texts by established experts—the elite—while elevating the individual's interpretation of texts above the views of those experts.[284] But more importantly, politicians, mostly on the right, have made

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[280] *See* LASSON, *supra* note 8, at 30 ("Nowadays the goal of publication is much less to find answers than to avoid perishing in pursuit of promotion and tenure."). Lasson discusses how promotion and tenure standards focus on articles published in law reviews rather than briefs, practice manuals, casebooks, or treatises. *Id* at 45. *See also* Sheldon & Krieger, *supra* note 279, at 883 (stating that law schools overvalue theoretical scholarship).

[281] *See* Roundtable Discussion, *supra* note 277, at 1 (noting that theoretical scholarship has become an "increasingly irrelevant tool for the practical work of arguing and deciding cases").

[282] FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 13 (2001).

[283] *Id.* at 14-15.

[284] For a widely embraced, interdisciplinary discussion of the core aspirations and limitations of postmodernism, see RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 27-28 (1989) (discussing how creating "one's mind is to create one's own language, rather than to let the length of one's mind be set by the language other human beings have left behind"). For discussions of postmodern legal theory, see, e.g., Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1184-1185 (1992) (asserting that "[p]ostmodernism is a flat rejection of universal knowledge and an outright denial of essential truths"); Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937, 937-939 (1990) (suggesting that "[t]he demise of foundationalism in twentieth century philosophical thought is largely reflected in the questions philosophers now ask. In epistemology, for example, debate has shifted from questions regarding the indubitable grounds for knowledge to an attempt to specify the conditions under which one can rightly claim to have knowledge.").

liberal judges a central theme of their politics, dating back to Richard Nixon,[285] and finding ample support in recent elections.[286]

The right wing, including the Bush administration and former majority whip Tom Delay, has elevated the distrust of experts to a new level. For example, until overwhelming evidence emerged in 2006 and 2007, the right wing routinely cited a few contrarian scientists who contended that global warming was not primarily a result of human activity.[287] The right wing's support for intelligent design suggests a similar disdain for hard science.[288]

As the authors of the *Georgetown* study point out, law professors are active in law reform organizations, like the American Bar Association and the American Law Institute.[289] No

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[285] *See* BookRags, America 1970-1979: Law and Justice, http://www.bookrags.com/history/america-1970s-law-and-justice/ (last visited June 4, 2007) (on file with the *Mississippi Law Journal*) ("In his 1968 campaign[,] Nixon told Americans that the Supreme Court had overstepped its constitutional role . . . . He pledged to appoint Supreme Court justices who would reverse the liberal decisions of the Warren Court. Nixon's appointments did move the Supreme Court in a more conservative direction."); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 330 (2005) ("Nixon deliberately used Supreme Court nominations as part of his law and order campaign against the Warren Court and decided that he wanted 'young conservative nominees' . . . . "). During his presidency, Nixon felt "persecuted by the East Coast Establishment, which loomed over American life and included the liberal intelligentsia at the universities and in think tanks; [and] the representatives of the big newspapers and network newscasts . . . . " He believed that, "as a Republican and conservative . . . he was governing in a media and political atmosphere that was intrinsically hostile to him." HALPERIN & HARRIS, *supra* note 32, at 31. One former protégé of Karl Rove stated that the Republican Party "'became a populist party under President Nixon because of . . . the resentment [toward] those elites.'" *Id.* at 32. Vice President Spiro T. Agnew questioned "the values and legitimacy of the Establishment media generally—not only the three networks but also the elite newspapers and national newsweeklies that collectively set the agenda for how a president was covered." *Id.*

[286] *See* AlterNet, Nan Aron, Judicial Disappointments (Feb. 18, 2004), http://www.alternet.org/story/17879 (on file with the *Mississippi Law Journal*) (discussing President Bush's "campaign to stack the courts" and his "inedible mark on the federal judiciary"); Elizabeth Drew, *Power Grab*, N.Y. REVIEW OF BOOKS (June 22, 2006), *available at* http://www.nybooks.com/articles/19092 (on file with the *Mississippi Law Journal*) ("[T]he Bush administration, like previous administrations, has tried to appoint judges compatible with the President's views. But Bush has been strikingly successful at putting extreme conservatives on the bench . . . . ").

[287] *See* CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 56-64, 82 (2005).

[288] *See id.* at 182-84.

[289] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1194-95.

doubt, the ABA and ALI do influence the direction of the law.[290] But those organizations are open to lawyers of all political stripes, and no one can seriously contend that they are captives of left leaning academics.[291]

Whatever influence left leaning law professors may have comes about haphazardly. That is, liberal law professors are not an especially well-organized group, with a single-minded agenda. By comparison, conservative groups have shown much greater acumen and discipline in advancing conservative ideology.[292] The Federalist Society has had far more influence than has any liberal organization. Its members influence the selection of law clerks by prominent conservative justices and judges.[293] Its members were active behind the scenes in assisting the lawyers in Paula Jones' suit against (and setting the perjury trap for) President Clinton.[294] Conservative organiza-

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[290] The American Law Institute, About the American Law Institute, http://www.ali.org/doc/thisIsALI.pdf (last visited June 4, 2007) (on file with the *Mississippi Law Journal*) ("The [ALI] . . . engages in intensive examination and analysis of legal areas thought to need reform. This type of study generally culminates in a work product containing extensive recommendations or proposals for change in the law . . . . The American Law Institute-American Bar Association Committee on Continuing Professional Education (ALIABA) produces books, periodicals, and audiovisual materials covering most areas of practice and offers courses of study and programs of instruction throughout the country . . . . ").

[291] Members of the American Law Institute are "selected on the basis of professional achievement and demonstrated interest in the improvement of the law." The American Law Institute, Membership Overview, http://www.ali.org/ (last visited June 4, 2007) (on file with the *Mississippi Law Journal*). The ALI has a "respected reputation for thoughtful and impartial analysis and it aims to assure that its membership reflects both the quality and the diverse character of a rapidly changing profession." *Id.*

[292] *See* HALPERIN & HARRIS, *supra* note 32, at 22-23, 28 ("The Bush campaign and the Republican Party [in the 2004 defeat of John Kerry] simply were better organized than the Democrats . . . . Republicans had thick and frequently updated research books, clip files, video archives, and real-time tracking of new data, as well as a full appreciation of the value of such tools . . . . Republicans understood the new environment of presidential politics more keenly than did the Democrats, and were far better positioned to benefit from it."). The authors further indicate that "liberals have no system that comes close to [the Republican's] tribal cohesion and in putting as many oars in the water as possible to row in tandem." *Id.* at 299. *See also* HACKER & PIERSON, *supra* note 152.

[293] *See* LAZARUS, *supra* note 168 and accompanying text; Bach, *supra* note 168 and accompanying text.

[294] *See* JOE CONASON & GENE LYONS, THE HUNTING OF THE PRESIDENT: THE TEN YEAR CAMPAIGN TO DESTROY BILL AND HILLARY CLINTON 126-27, 261-62 (St. Martin's Press 2000) (discussing the various connections between the Jones camp and prominent members of the Federalist Society); DAVID BROCK, BLINDED BY THE RIGHT: THE

tions like the John M. Olin Foundation are generous donors to conservative causes, including law schools.[295] Indeed, liberal foundations cannot match the wealth and, as a result, influence of conservative foundations.[296]

The *Georgetown* study authors also argue that liberal law professors influence the way in which legal debates are framed.[297] Similarly, former Boston University Dean Cass argued that liberal law professors write the case books and get to frame the issues in their classes.[298] No doubt, law professors must make choices about which texts to select and can pick ones that lean more towards their own perspective of the law. We must also frame questions, consciously and unconsciously directing the focus of a class. But to conclude that this gives law professors meaningful power in shaping the law is contradicted by reality. No matter how left leaning, professors cannot ignore relevant modern Supreme Court case law and, other than extreme conservatives, few can deny that this is one of the most conservative Courts in modern history.[299] Thus, even if liberal

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CONSCIENCE OF AN EX-CONSERVATIVE 331 (2002) ("The Federalist Society of right-wing lawyers . . . had been at the heart of the anti-Clinton conspiracy . . . . ").

[295] The John M. Olin Foundation has given large sums of money to promote conservative programs at prestigious colleges and universities. Some of the major donees include conservative law schools such as George Mason and the University of Virginia, as well as conservative groups such as the Federalist Society and The Heritage Foundation. Media Transparency, John M. Olin Foundation, Inc. Grant Recipients, http://www.mediatransparency.org/recipientsoffunder.php?funderID=7 (last visited June 5, 2007).

[296] *See* HALPERIN & HARRIS, *supra* note 32, at 38-39 (stating that the institutional elements of the conservative movement have grown substantially larger over the past forty years, while the liberal group power has shrunk). According to the authors, the top strategists of the current Republican administration "encourage[] the spending of outside groups," and a "well-cultivated infrastructure . . . mean[s] that there always [are] rich people . . . willing to lend a hand." *Id* at 322. *See also* HACKER & PIERSON, *supra* note 152, at 9, 144 (stating that the Republican Party in particular has "grown much more . . . adept at targeting their resources to maintain partisan unity and power . . . . Today, the GOP holds a two-to-one advantage in corporate donations.").

[297] McGinnis, Schwartz & Tisdell, *supra* note 9, at 1190, 1193-05, 1201 (stating that liberal law school faculties generate innovative legal ideas, "color . . . public expressions of expertise—such as academic 'rating' of judges," influence legal reform, and "generate new legal frameworks." Further stating that faculties "set law school curricula[,] . . . determine what should be taught in class[,]" and arrange "workshops, symposia and other engagements, which themselves generate policy discussions on campus . . . ").

[298] DVD, *supra* note 14.

[299] *See A Newly Conservative Supreme Court* (NPR broadcast Oct. 2, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=6180004 (on file with the *Mis-*

law professors are more inclined to argue that the Supreme Court should protect individual liberty and not property rights,[300] they cannot ignore cases like *Lucas v. South Carolina Coastal Council*[301] and other modern property rights cases.[302]

For many of us in the academy, the idea of liberal law professors routinely shaping the law is fanciful. Law school changes students; but almost certainly, some students become more conservative, while others become more liberal, as they are forced to think more deeply about their ideas. That is a normal part of growing up.[303] Law students are adults, less likely to be swayed by their professors.[304] Furthermore, few of us believe that appeasing law professors influences Supreme Court Justices' views.[305] Some Justices, like Justice Scalia, seem to enjoy confounding liberals;[306] others, like Justice Kennedy, lost their opportunity for eternal gratitude of liberals by voting in favor of President Bush in *Bush v. Gore*.[307] At best, the idea that liberal law professors are influencing the direction

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sissippi Law Journal) (discussing the new conservative direction of the Supreme Court after the addition of Justices Samuel Alito and John Roberts). It is possible that "we will look back . . . and say the conservatives finally got the Supreme Court they'd been trying to get for twenty years." *Id.* (quoting Tom Goldstein, teacher at Stanford and Harvard Law Schools).

300 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

301 505 U.S. 1003 (1992).

302 *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

303 *See* Vitiello, *supra* note 185, at 996; Daicoff, *supra* note 240.

304 *See* Liptak, *supra* note 73 (quoting Judge Richard A. Posner) ("I don't think the liberal bias of law school faculties has much impact on the students . . . . Law students are careerists, and for them law school is career preparation, not Sunday chapel.").

305 The authors of the *Georgetown* study argue that law professors "can influence the current course of the law" through their assessment of Justices. McGinnis, Schwartz & Tisdell, *supra* note 9, at 1196-97. They state that "Justices are likely to alter their jurisprudence, at least at the margins, toward what they would expect members of the legal academy to prefer." *Id.*

306 In a recent lecture, Justice Scalia declared that *Bush v. Gore* is old news and everyone should just "get over it." Edward Lazarus, Supreme Court Justices' Increased Propensity to Speak Publicly: It May Be Positive At Times, But When the Justices Speak Out On *Bush v. Gore*, They Only Do Further Damage (Mar. 6, 2007), http://writ.news.findlaw.com/lazarus/20070306.html (last accessed Nov. 1, 2007) (on file with the *Mississippi Law Journal*).

307 531 U.S. 98 (2000). Mark Tushnet's *A Court Divided* undercuts the theory that Justices become more liberal while on the Court as a way of assuring their popularity. Tushnet suggests that Justices reflect the politics of the presidents that appointed them far more than generally recognized. TUSHNET, *supra* note 285, at 319-45.

of the law is flattering; but, as argued below, it may also be dangerous.

VII. SOME THOUGHTS BY WAY OF A CONCLUSION

In thirty years of teaching law, I can think of no instance in which a colleague has been sanctioned for conservative political views.[308] Across the country, conservative faculty routinely express themselves without being denied or losing tenure.[309] Nowhere can I find evidence that left leaning professors have run off conservative faculty. That is, conservatives seem quite free to voice their views without fear of reprisals. Although infrequent, the same cannot be said of some conservative religious schools where they might as well post LIBERALS NEED NOT APPLY signs above their doors.[310] And yet many conservative writers have spread a myth about the liberal bias rampant on campus and are attempting to create a new class of victims among students and prospective faculty members.

Elsewhere, where it matters, conservatives have used the same tactic to undercut the credibility of the national media. Routinely decrying the liberal media, right-wing talk show hosts, Fox News, and others have put the main stream media on the defensive.[311] According to some commentators, the con-

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[308] In the closest instance of politically correct thinking, in one instance a visiting professor used an inappropriate reference to African-Americans. The administration did respond by instituting remedial measures, including some diversity training for the student body and faculty the next semester.

[309] *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). Critics of the left leaning bias of the academy urge the hiring of more conservatives; they do not contend that law faculties do not include conservatives. Nor do they cite examples where conservatives have been fired or denied tenure of promotion because of their views. *See* McGinnis, Schwartz & Tisdell, *supra* note 9.

[310] In modern history, during the McCarthy era, some left-wing professors did lose their jobs because of their political views. *See* Lisa Petrillo, *Faculty Members See Bill as 'Grave Threat' to Freedom*, UNION TRIBUNE (April 20, 2005), *available at* http://www.signonsandiego.com/news/education/20050420-9999-7m20commies.html (on file with the *Mississippi Law Journal*) (stating that "500 college professors nationwide . . . lost their jobs during the McCarthy era, many of them blacklisted for years afterward"). I can think of no similar systematic attempts to purge conservatives from our campuses.

[311] Some argue that complaints of liberal bias have "spooked" the media, causing editors and reporters to "lean the other way, thus ensuring that news about politics carries a conservative bias." HALPERIN & HARRIS, *supra* note 32, at 42. Liberals believe

certed efforts of the Republican National Committee and "new media" representatives like Matt Drudge and Rush Limbaugh led to John Kerry's defeat in 2004.[312] According to David Brock, a convert from the right-wing cause, liberal reporters work hard at achieving fairness. Conservative members of the media, seeing themselves as oppressed by liberals and in the service of a higher cause, have less regard for standards of fairness.[313]

The authors of the *Georgetown* study do not make radical recommendations for reforming the composition of law faculties. But that has not stopped radical right-wing critics of the academy from citing the report as more proof of the prejudice against them.[314]

I draw a few lessons from the attack on undergraduate institutions. One is that liberal professors ought to be sure that we do not stifle conservative students from expressing their views *if we invite liberal students to express their views.*[315] Furthermore, we ought to be sure that we challenge superficial thinking of all of our students, not to avoid claims of bias, but because challenging our students' views is essential to our mission.[316]

A second lesson is that data are important. For example, countering claims of bias by showing the lack of harm to stu-

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that the rise of the New Media is evidence that "conservatives have succeeded in 'working the refs,' resulting in timid coverage." *Id.* at 45. *See also* BROCK, *supra* note 294, at 34 (discussing the neoconservatives' increased access to the "prestige media" and their ability to label the liberal viewpoint as "dangerous" and "un-American").

312 HALPERIN & HARRIS, *supra* note 32, at 4, 28-29.

313 *See* BROCK, *supra* note 294, at 21-22 (describing the "conservative movement" as a "well-financed, tightly run political machine intensely devoted to enacting a rigid ideological orthodoxy"). Brock further states that "[i]n twelve years of right-wing journalism, my work had never been fact-checked." *Id.* at 295. The conservative media, which marketed itself as "objective journalism," justified its ideological bias and less-than-accurate reporting as a legitimate response to the perceived liberal biases of the media. *Id.* at 27.

314 *See* discussion *supra* Section II.

315 As I have argued elsewhere, soliciting students' views is overrated. Instead, we ought to be forcing students to articulate rules, to understand the policies that drive those rules, and to apply the rules before we worry about students' views of the law. *See supra* notes 235-43 and accompanying text.

316 Vitiello, *supra* note 185, at 997.

dents based on their political views is powerful.[317] Empirical research was beyond the scope of this article. But a few areas of research come to mind: one is the need for a careful study of students' grades in law school, comparing credentials and political persuasion to determine whether any bias exists. As I argued above, I doubt it.[318] More importantly, claims of bias against conservatives will pale if a thorough study of the applicant pool (and the credentials of the candidates) demonstrates that it is not filled with large numbers of highly qualified conservative candidates who are passed over because of their views.[319] Additional research might include the political views of adjunct faculty as well.[320]

Armed with good data, liberals ought to take the offensive. We ought to be proud of the virtues of liberalism, including its openness to ideas and the premium it places on liberty. We should not be embarrassed that liberals may be overrepresented on law faculties—as has become increasingly clear:

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> [M]any administrators, faculty members, and students . . . discussed the actual conditions of academic freedom on the public campuses and the procedures that were already in place to deal with intimidation, bias, and infringement of students' rights. These witnesses were most effective in demonstrating the lack of problems concerning academic freedom and the effectiveness of existing institutional procedures. Testifying that academic freedom was well protected were 24 of 28 Pennsylvania students, 24 of 29 Pennsylvania faculty members, and all 8 of the administrators, including the presidents of Pitt, Temple, and Millersville . . . . "

James Bergquist, Co-chair, Academic Freedom Committee, American Association of University Professors (AAUP), The Saga of HR 177: Pennsylvania's Encounter with the "Academic Bill of Rights," http://www.aaup.org/AAUP/GR/ABOR/Resources/Saga177.htm (last visited June 5, 2007) (on file with the *Mississippi Law Journal*). *See also* Testimony of Winifred Ann Frolick, graduate student at Duquesne University, http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=doc_download&gid=35&Itemid=25 (last visited June 5, 2007) (Testimony before the Pennsylvania House Committee on Student Academic Freedom in a hearing concerning H.R. 177, 2005 Leg., 177th Sess. (Pa. 2005) ("I've had plenty of professors whose political beliefs were different from my own—sometimes drastically different . . . . At no point was I ever penalized for having beliefs differing from that of my professors . . . . Generally it was my 'difficult' professors, the ones who were most 'controversial' [from whom] I learned the most [] since they made me dissect every part of my beliefs and learn to defend them . . . . Political bias in my experience just isn't a problem in Pennsylvania's schools . . . . ").

318 *See supra* Section IV, pages 539-43 and accompanying notes.

319 *See supra* Section IV, pages 537-39.

320 *See supra* Section IV, pages 527-29 and notes 123, 127-28.

"As a general rule, liberals are more open-minded in their pursuit of creativity, novelty, and diversity . . . " than are conservatives.[321]

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[321] Jost, *supra* note 177, at 664.

CONSCIENCE, TOTALITARIANISM, AND THE POSITIVIST MIND

*Robert John Araujo, S.J.**

> Now that the Court has determined to condemn me, God knoweth how, I will discharge my mind . . . concerning my indictment and the King's title. The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God. . . . I am the King's true subject, and I pray for him and all the realm . . . I do none harm, I say none harm, I think none harm. . . . Nevertheless, it is not for the Supremacy that you have sought my blood—but because I would not bend to the marriage!
>
> Thomas More[1]

> The sphere of action of the State has grown steadily larger until it now threatens to embrace the whole of human life and to leave nothing whatsoever outside its competence.
>
> Christopher Dawson[2]

> I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job.
>
> Justice Oliver Wendell Holmes[3]

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* Professor Ordinarius, Pontifical Gregorian University, Rome; Robert Bellarmine Professor of Public and International Law, Gonzaga University, Spokane.

[1] ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS 159-60 (1962). These are close to More's own words. In a letter to his daughter, Margaret, dated May 2 or 3, 1535, he said: "I am, quoth I, the King's true faithful subject and daily . . . pray for his Highness and all his and all the realm. I do nobody harm, I say none harm, I think none harm, but wish everybody good. And if this be not enough to keep a man alive in good faith I long not to live." Letter from St. Thomas More to Margaret Roper (May 2 or 3, 1535), *in* ST. THOMAS MORE: SELECTED LETTERS 247-48 (Elizabeth Frances Rogers ed., 1961).

[2] Christopher Dawson, *Religion and the Totalitarian State* (Oct. 1934), *in* XIV THE CRITERION 1 (T.S. Elliot ed., 1967).

[3] Letter from Justice Oliver Wendell Holmes to Harold J. Laski (March 4, 1920), *in* 1 HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953).

I. INTRODUCTION

For thousands of years, the question of conscience in the law has played a prominent role when conflicts have arisen between individuals and the civil authorities about the extent to which an individual has had to publicly endorse particular views favored by the state. Socrates, Thomas More, Rosa Parks, each was brought before the law because of their disagreement with some rule, and each stood their ground, often in a quiet, even private way, with the force of reason and conscience reinforcing their position. In taking their positions, any public message they conveyed was typically done without violence, pressure, vitriol, or sensation. It was accomplished, instead, through the synthesis of mind and soul working in harmony.

It is the purpose of this essay to examine conscience removed from the drama and heroism of peaceful civil disobedience. Put simply, this essay is designed to look at the nature of conscience itself and what it may mean in the context of general legal settings.

At first glance, conscience and the law may appear to be as related as dogs and cats or oranges and apples. It would seem that conscience is, among other things, a defense to be relied upon when the law and its rules go in one direction, but the person of conscience chooses to go in the opposite direction. In other contexts, conscience may appear to be a mechanism by which an individual defends public or private resistance to the law. For example, the late Rosa Parks was a person who had to ride the bus, but as a woman of color she had to sit in the back of the bus under the local law. Was the back of the bus so crowded that she decided to sit toward the front where there was more room, but where she was forbidden to sit? Or did she simply elect to defy convention and the law to make a point by demonstrating that riding the bus was a public conveyance to be used by all members of the public? In either case, she challenged the law and her defense was rooted in conscience—the need to make a gesture showing why the law and its application are wrong and why she is right to defy it.

But conscience can manifest itself in other ways. For example, Thomas More chose to take no action, as Ms. Parks did, in defiance of the law. More, instead, chose not to do something

which the law mandated; he chose to remain silent. More had no quarrel with Parliament or the King, because he said nothing about the propriety or impropriety of the Act of Succession until after he was convicted of treason. He recognized that both the King and Parliament had a proper role in the making of law, human law. If Parliament had said that the King was God, he would have done nothing to interfere; however, when Parliament said the King rather than the Pope was head of the Church and commanded More to publicly declare his agreement by taking an oath that would conflict with his convictions about the respective authorities of the Church and the King, More could not do this because of conscience. For More was also subject to God's law, which said such a declaration would violate the higher law that is beyond the competence of the state.

Both of these cases require some understanding of the nature of law. Fundamentally, societies need law. The degree of complexity of the society does not matter, because each needs some code or body of norms that are known, at least in a rudimentary fashion, and that help the members regulate their conduct which has interpersonal implications—red lights mean "stop," green lights mean "go." Often the law can be viewed as a good that leads to an ordered society. Normative principles guide everyone including those who make, administer, and decide under the law. These normative principles are also generally considered to be a good thing.

Both the Decalogue[4] and common sense dictate that one person should not kill another human. This leads the lawmaker to declare that homicide is a criminal act, the commission of which is punishable by law. However, there may be occasions when, because of conscience, a person might be justified in taking the life of another. One illustration involves the law abiding citizen who is at home or out for a walk and is accosted by an assailant who intends to kill him or her. Here, the only way in which the law abiding citizen can repel the attack is through the use of deadly force. It might be said that conscience has justified the homicide in this case because an internal sense or conviction led the would-be victim to the conclusion that it is good

[4] *Deuteronomy* 5:1-21; *Exodus* 20:1-17.

to live and that it is necessary to take the life of the assailant in order to preserve their own life. This exercise or observance of conscience can aid in justifying the intended victim's action which, considered by itself, would normally contravene the law against taking human life.

But when the law appears to lead to a harmful conclusion in which wrong would triumph over right, conscience may help develop the law or its meaning through exception or re-promulgation so that the right result would prevail over the wrong one. Consequently, the exercise of conscience could lead to a realization that the world is engulfed by relative explanations or excuses for why terrible things happen. In the contemporary world of the twenty-first century, the law may be viewed as a means to promote the common good and the general welfare even though it may cause inconvenience to some individuals, like the legal requirement to pay taxes, or outright frustrations to others, like the legal prohibition against robbing banks. Therefore, it might be concluded that good laws respect human dignity.

One does not have to look far in today's world to realize that many laws, when exercised in an ordered fashion, are geared toward promoting rights and liberties. It is also clear that laws are designed to apply general formulations to specific cases.[5] But as citizens, lawmakers, administrators, and judges all come to realize, the law often requires interpretation in applying general norms to specific circumstances. To develop the illustration used a moment ago involving the use of deadly force in self-defense, this may sometimes require that the interpretation lead to an exception to the general rule prohibiting homicide if the law and its application are to be just. Thus, the intended victim who exercises conscience to repel a deadly attack may lead lawmakers to craft an exception to the law prohibiting homicide in cases of self-defense.

At this stage, we can begin to assemble core principles about the good citizen, the law, and the exercise of conscience. The good citizen pays taxes, only puts the trash in legally mandated containers, and drives on the right side of the road wher-

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[5] *See* H.L.A. HART, THE CONCEPT OF LAW 159-60 (1961).

ever required but drives on the left wherever that is the norm. The good citizen dutifully complies with the requirements of the law, is a good neighbor who loves and cares for his or her spouse and children, and greets all who come their way with a friendly attitude, while always striving to be a productive member of the community who contributes both physically and spiritually to the common good. But then one day, obedience to law demands that this good citizen compromise a principle that the citizen holds dearly. It is not simply the authority saying "you must think this way" and leave it at that (for then the citizen could go on thinking as before), but the authority now insists, "you must do it this way, and if not, you will have to face consequences that are not of your liking." This is the famous story of Thomas More, but it likely is also the story of many other citizens less well known to society and to history. In all cases, it is the story of conscience.

The three quotations that appear at the beginning of this essay set the stage for what follows. I begin with conscience and the remarks of Thomas More.[6] Thomas More was a scrupulous lawyer, husband, father, statesman, legislator, judge, and saint. But one day, his reasoned intellect informed him that he could not publicly assent to what he believed, in his reasoned judgment, was a falsehood. If he could have said nothing, which was the course he preferred to take, he may have died an old man in his bed surrounded by the company of his family and friends. However, because he would not bend to what that the law required, he was declared a traitor, tried, sentenced and executed under the law of the King and Parliament.

This leads to the second introductory quotation.[7] Christopher Dawson was a gifted student of history and of his time. Dawson understood the threat that the nascent National Socialist Party, the ensconced Communists in Russia, and the Fascists in Italy posed, not only within their own countries, but across the world. Today, we accept, although the reality sometimes leaves much to be desired, that the law cannot transgress certain places because, after all, the law and the state are in-

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[6] *See supra* note 1 and accompanying text.

[7] *See supra* note 2 and accompanying text.

struments of humanity. Yet, humanity is not the state's vessel. Still, in Germany, Russia, and, to a lesser extent, Italy, the state, or the "party," excelled to be the paramount justification of human existence. It personified humanity and did not exist to be its servant. The state, including the sole political organization existing at its core and its highly centralized authority, determined not only what people must do, but also what they must think; and if they thought contrary to the views of the state, they would do so at their own peril.

Where there is no departure from this constriction, which adversely impacts the properly formed conscience geared to the moral objective order that protects the inherent dignity of all, people live in a totalitarian state. The same is true even when the state insists that it is governed by law that is both knowable and known. This leads to the issue of positivism, where the law exists simply because the lawmaker presents the law without any moral evaluation of its content, existence, or justification. In the positivist mind, the lawmaker exercises a will, but not the intellect that probes the justification for a rule. If an intellect is present at all, it typically searches for justification of a goal that has no principled basis. But this intellect is neither concerned with the moral implications of the objective nor the means used to reach it.

The third introductory quotation is from former United States Supreme Court Justice Oliver Wendell Holmes.[8] Although Justice Holmes has been regarded as a highly skilled lawyer and jurist, his quoted observation captures an essence of law that does not venture far from the pen or computer keyboard of its drafter. Holmes's view posits that the law is what the lawmaker says and, without further evaluation or critique, that is that. The lawmaker who engages the lawmaking process in this fashion exercises the positivist mind of which I speak.

One might think that the problems I raise are of no concern to contemporary democratic societies of the early twenty-first century; after all, the totalitarian state is a thing of the past, or so it seems. Moreover, most law is positivist and, generally, serves democratic societies in a satisfactory, but not perfect,

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[8] *See supra* note 3 and accompanying text.

manner. Today, this latter point should find consensus among most practitioners, teachers, and students of the law. In virtually all democratic societies, lawmaking is the law that the lawmaker posits. But this method is not positivism where the culture and citizenry have no critical, objective evaluation of what the lawmaker says is the law. Positivism generates a type of human-worship that knows only the mind of the lawmaker, as a person or group, and what the lawmaker sees as the end of the human purpose. It is the "dominant prejudices of the moment," rather than some objective and moral compass, that guides society.[9]

This point is illustrated by the Massachusetts Supreme Judicial Court's 2003 opinion in *Goodridge v. Department of Public Heath*,[10] where a majority of the court asserted that "civil marriage is an evolving paradigm" and redefined marriage to include those between homosexual couples.[11] It is the positivist state, and the mind that guides it, whose law is geared to some end or result without asking what happens along the way. This approach is the basis of the totalitarian state's legal, positivist system. But surely the world of today does not have to worry about such matters, does it? If so, would not the exercise of conscience and the ability to object through its exercise, as guaranteed by domestic and international laws, make this problem disappear?

Conscience is that core of a person who, with the exercise of right reason and guided by the quest for objective truth,[12] delib-

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[9] CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON 127 (Gerald J. Russello ed., 1998).

[10] 798 N.E.2d 941 (Mass. 2003).

[11] *Id.* at 967. The majority of the court did state in a footnote that the decision "in no way limits the rights of individuals to refuse to marry persons of the same-sex for religious or any other reasons" and "in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage." *Id.* at 965 n.29. The court stated that its concern was, rather, "whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry." *Id.* The court's dicta, however, would not restrict the Massachusetts legislature from enacting a law to this effect.

[12] The significance of right or practical reason and the law was relied upon and developed by Thomas Aquinas in his *Treatise on Law*, where he stated, as the first principle of the law, that "good is to be done and pursued, and evil is to be avoided." THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, q. 94, art. 2 (Fathers of the Dominican Province, trans., Benzinger Brothers 1947). Right reason is a search for truth that is not only

erates and discerns what is right and what is wrong and then formulates a belief that guides his or her path in life. The path chosen and the choices made along the way clearly have an impact on the individual and their life. As this essay will illustrate, the individual's path and choices also have a bearing on the lives of other individuals and communities. Consequently, the exercise of conscience endorsed here is not one that permits a person to conclude that he or she has the right to do whatever his or her conscience instructs simply because their conscience decides such. The peril inherent in this practice of conscience is that it is purely subjective and makes no provision for considering, by going beyond the self, the objective truth needed to determine what is right and wrong, not only "for me" but for everyone who may be affected by the exercise of individual conscience. Otherwise, the exercise of conscience risks confusing falsehood with truth and right with wrong. One has the right to express the view of their conscience, and to assert that another individual is wrong. In doing so, the first individual who sought the objective truth may have to prepare to be persecuted. But the threat of persecution, or the persecution itself, is not sufficient to preclude the right of conscience as so understood. There is a need for public peace and security, and when properly understood and objectively formed the exercise of conscience poses little or no threat.

Let me now provide some illustrations of the exercise of conscience, which demonstrate the difference between claims of conscience that are objective and those that are not. While people have the right to claim conscience, the question is whether its exercise is founded on objective truth or individual fancy. For example, suppose there is an auto-mechanic who refuses to

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conceptual but also practical. The search for truth is inextricably combined with the application or implementation of the truth undistorted. In this way, the rational and the moral merge through the exercise of right reason. See AUSTIN FAGOTHEY, RIGHT AND REASON: ETHICS IN THEORY AND PRACTICE 99-101 (6th ed. 1976), for a more contemporary explanation of right reason. *See also* POPE PAUL VI, SECOND VATICAN ECUMENICAL COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD No. 63 (1965) ("[T]he Church down through the centuries and in the light of the Gospel has worked out the principles of justice and equity demanded by right reason both for individual and social life and for international life, and she has proclaimed them especially in recent times.").

take apart wrecked automobiles for salvageable parts because he believes in the integrity of the auto, and, in conscience, he refuses to comply with his employer's instructions. The conscience this mechanic exercises is based not on objective truth but on individual fancy; moreover, he is able to find new employment with a shop that restores automobiles. A second auto mechanic, however, is employed by the only place where his specialty and trade are in need. His employer runs a "chop shop" in which stolen cars are broken into components and sold. So far this mechanic, just as the first mechanic, has worked only on legal activities, but his employer begins to pressure him to participate in the shop's illegal activities. Knowing that there is no other place to go for gainful employment (the mechanic must stay in this community because of familial obligations) this mechanic tries to exercise, with great difficulty, the objectively formed conscience while knowing the consequences of doing so.

Let us consider a second case involving high school students. One student insists on using the "up" stairs to go down and the "down" stairs to go up. When questioned about this practice by school authorities, the student replies that he does this out of conscience. But is this not really performed out of whim rather than based on some objective principle? A second student is aware of a small group of her classmates who engage in anti-social behavior, but she minds her own business until the day she is targeted by the group. The anti-social group pressures her to engage in dangerous and illegal activity. The student, knowing that there may be reprisals for not joining the group, stands her ground and refuses to join the group despite the foreseeable consequences because of her objectively formed conscience.

Let us consider a third case involving two individuals in the Army, Private Smith and Private Jones. The Army does not require Private Smith, a vegetarian, to eat meat; however, she is required to serve kitchen police duty one day and she refuses, in conscience, to assist the cook in preparing meatloaf for dinner. This exercise of conscience is not based on objective truth. The circumstances involving Private Jones, on the other hand, are based on objective truth. He is a member of an elite unit engaged in the dangerous assignment of pursuing suspected

terrorists. Private Jones's unit successfully tracks down and apprehends a suspect. His superior decides to use interrogation techniques that violate applicable legal norms in order to extract information and Private Jones objects to these activities based on an objectively formed conscience.

Opponents of those who make arguments from conscience may, as Judge Michael McConnell has argued, suggest that conscientious objectors have in mind all sorts of savage acts, but, in reality, conscientious objectors want to obey the "*fundamental* laws of the state" since it is usually a lawful authority that acts within its proper competence as a servant of all the people it serves.[13] A problem arises when the law and conscience directly oppose one another. In these cases, the legitimate goals of the law must be achieved in some other fashion, because the state's purpose is of "a distinctly lesser order."[14]

In order to make this distinction, a well-trained judge is needed. But how well is the contemporary judiciary trained to deal with the conflict between the morally justifiable position of conscience and the dictate of the positive law? Professor Gregory Sisk has ventured into this realm.[15] He recognizes that judges are not disqualified from being moral people; however, they are not trained in making moral judgments, but rather in adjudicating controversies between the parties before the law.[16] For judges to decide the debates that occur within society which raise questions not about the law but about what is right and what is wrong would take the judicial role beyond what constitutional and basic law dictates and into the field of "judicial legislation."[17] This is especially true when someone calls upon judges to decide a controversy that extends beyond the existing

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[13] Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 846 (1998) (emphasis added).

[14] *Id.*

[15] *See* Gregory C. Sisk, *The Moral Incompetence of the Judiciary*, FIRST THINGS 1, 34-39 (Nov. 1995).

[16] *Id.* at 35.

[17] In an American constitutional context, this would, of course, raise a concern about a violation of the separation of powers doctrine. Undoubtedly, there are occasions when the line between the proper judicial activity of interpretation and the responsibilities of the legislative branch is not always clear.

law or the ability to formulate new law. Another way of viewing this problem is by considering those situations where judges are asked to decide controversies that do not pertain to an authentic legal dispute but involve disagreement about convictions with which the law is not concerned. The jurisdiction of judges is not as broad as some parties may like to suggest; moreover, judges are not society's moral agents who must reconcile disagreements pertaining to exercises of conscience.

The same point applies to legislators and administrators. Democratic institutions must exercise limited rather than unlimited power; therefore, popular sovereignty serves as an important means of review. Where popular sovereignty is a core principle at the heart of the legal and political culture, the state is not, and must not, be called upon to reconcile all differences of opinion, especially in those circumstances where society should be directing itself rather than being compelled to do something by an agent of the state. The state's proper role is to keep an order that enables members of the democratic society to live peacefully with one another. The state, in such circumstances, is the servant rather than the master. But, when the state becomes the master, the claim that the state is democratic becomes a myth. Otherwise modern democracies would morph into platonic states where philosopher monarchs, or repressive regimes, rule absolutely. Justice Byron White said as much when he dissented in *Roe v. Wade*:

> With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. . . . The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an *exercise of raw judicial power*, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and ex-

> travagant exercise of the power of judicial review that the Constitution extends to this Court.[18]

Justice White suggested that the majority of Justices on the Supreme Court had gone where courts ought not to go.[19]

The subject of conscience also deals with the matter of where government authority should not go—into the innermost convictions of those who are its citizens, subjects, and ultimately its masters. Why? As Professor Sisk has argued, the state's powers, like those of judges, are circumscribed.[20] Government authorities are not omnipotent; rather, they have limited authority prescribed by the rule of law and the sovereignty of all the people. What the rule of law dictates is not determined by one individual or authority. One justification for this view is that there is a place where no government can or should go: the conscience of the individual. The state may properly ask for citizens' allegiance on issues of public import affecting the common good, but the state ought not to go any farther. Conscience is a fundamental right, as will be explained. The state does not confer it; its source is not the existence of the state. Its source is in human nature, given by the Creator. And for those who make no claim to and even deny any theistic belief, I say this: the state did not create you; it is neither your author nor final master. What the state cannot give, the state cannot lawfully retrieve even though it tries to on occasion.

II. WHAT IS CONSCIENCE? A PRELIMINARY UNDERSTANDING

In order to proceed, it would be useful to develop a basic understanding of conscience. Conscience must be more than views and beliefs when one considers the reality that some people may entertain strange or harmful ideas that should not be put into practice. Conscience is not the freedom to believe in whatever one chooses to believe in simply because an interior directive says so. This "conscience" is guided by pure subjectiv-

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[18] Roe v. Wade, 410 U.S. 179, 221-22 (1973) (White, J., dissenting) (emphasis added).

[19] *Id.*

[20] Sisk, *supra* note 15, at 38.

ity. For example, someone may consider that in the exercise of conscience it is permissible to rape, kill, or steal. The justifications for these acts, which have deleterious consequences for other persons, are a flimsy recitation of conscience. Conscience is more than the inner voice that prompts a person to do whatever the individual's whim directs. Professor Steven D. Smith has recognized this problem and examined its effect. As he astutely notes in his commentary on the work of others regarding the nature and scope of conscience, its meaning can be corrupted.[21] A major source of the corruption is that conscience, for some people, is based on a purely subjective approach to what is right and what is wrong. Consequently, there is no safeguard beyond the individual who regulates the exercise of conscience and determines what it means and what it does not.[22] These circumstances can present considerable problems.

In effect, conscience becomes the laboratory for the famous dicta in *Planned Parenthood v. Casey* where a plurality of the Court stated, "[There] is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[23] Had the Court plurality stopped there this dicta may not have become the problem that it is today. However, the plurality continued in its elaboration of what it meant by "liberty" that is associated with the exercise of conscience. This personal liberty, according to the *Casey* plurality, is premised on additional dicta that states, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[24] The *Casey* plurality may well have been correct in placing a limit on the state through their formulation of liberty. However, should not critical thinking, reason, and points of reference beyond the purely

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[21] Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 325-326 (2005).

[22] *See* Kathleen A. Brady, *Foundations for Freedom of Conscience: Stronger than You Might Think*, 10 ROGER WILLIAMS U. L. REV. 359 (2005) (suggesting that there can be an argument for subjectivity for conscience as well as a strong argument for objectivity).

[23] Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).

[24] *Id.* at 851.

subjective have a role in determining what the boundaries of this personal liberty are as well? This expansive dicta offers no guidance when the conceptions of liberty offered by two or more persons following the *Casey* roadmap end up on a collision course. The highly subjective *Casey* definition of liberty is not a desirable method of finding out what conscience means and what it does not. Fortunately, we can examine and evaluate how others have defined the exercise of conscience.

Professor Steven Smith has catalogued well the diverse views on the meaning of conscience by examining the diverse works of individuals such as Professors Marie Failinger, Lawrence Tribe, and David A.J. Richards.[25] As Smith notes, the diversity of opinion has fostered a "degradation" of the meaning of conscience.[26] Smith has afforded some explanation of the concept by suggesting that conscience has something to do with being "a full person" that may or may not be based on the religious perspective of the individual whose claim to conscience is being examined.[27] But the investigation into the meaning of conscience does not stop there.

In building upon the work of Noah Feldman,[28] Martin Belsky considers conscience and its free exercise as the ability of individuals, especially those members of some "minority" group, to be free from coercion so that they can act or not act in accordance with some "core personal beliefs or principles."[29] The Belsky definition tends to be subjective in that the person or group claiming the right of conscience develops the core beliefs or principles without reference to anything beyond the individual or the group. It is important to note that Belsky qualifies the application of this right to conscience only against the state, not

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[25] Smith, *supra* note 21, at 326-27.

[26] *Id.* at 325.

[27] Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. Colo. L. Rev. 911, 940 (2005).

[28] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 424 (2002) ("[A] person is entitled not to be coerced into performing actions or subscribing to beliefs that violate his most deeply held principles.").

[29] Martin H. Belsky, *A Practical and Pragmatic Approach to Freedom of Conscience*, 76 U. COLO. L. REV. 1057, 1062 (2005).

to "non-governmental infringements."[30] Presumably this means to other people, either as individuals or as groups.

Professor David Richards, to whom Professor Smith has referred, ultimately relies on a subjective definition of conscience. In his examination, Richards juxtaposes civil disobedience with the exercise of conscience, and relies on the model of Martin Luther King, Jr.[31] Richards constructs an interesting theory of conscience in which the state, as lawmaker and enforcer, must constantly be in a dialectical relationship with its citizens where the legitimacy of the state's activities, as defined by the law it makes and applies, is regularly tested by the conscience of its citizens.[32] The citizen may determine that the law or its enforcement is unjust and test the state by an act of "symbolic, peaceful, illegal, but not harmful" civil disobedience.[33] This conscience-based civil disobedience, in turn, can be the catalyst that assists rather than frustrates the legitimacy of lawmaking and the law's enforcement by rehabilitating the injustice which is the catalyst for the complaint of the person of conscience. Richards suggests that the conscientious objector dissents on the basis of "constitutional ideals,"[34] but the standards of objectivity and subjectivity are not clearly defined in this process. Richards concludes this part of his explanation of conscience by stating, "Part of the coherent meaning of obedience in democracy is that this obedience [to the state or its government] must be earned and constantly tested so that when citizens obey, their obedience expresses the moral sovereignty of each person to the greatest extent feasible in a political order."[35] Again, the exercise of this conscience is determined or regulated by subjective rather than objective standards since the sovereignty of the state is tested by a private sovereignty whose source appears to be purely internal to the person. In the construction of this personal sovereignty, the individual does not appear to rely on

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[30] *Id.*

[31] David A.J. Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 787 (1984).

[32] *Id.* at 787-89.

[33] *Id.* at 787.

[34] *Id.* at 789.

[35] *Id.*

something beyond the self that can provide objective guidance in the formulation of conscience. This could well lead to the problem I have already identified when the conscience of one person, so defined, conflicts with the conscience of another person who also relies on a subjective rather than an objective formulation of "personal sovereignty."

While Richards focuses on the positive that can emerge from the exercise of conscience, as illustrated by the example of Dr. King, Professors Christopher Eisgruber and Lawrence Sager present another plausible explanation when one considers the possibility that there is no outside regulation of the formation and exercise of conscience. They claim that a common good can emerge from the exercise of conscience; however, they also argue that "the internal phenomenology of conscience" can lead to evil as well.[36] Conscience so defined can result in greater justice for all by feeding the poor, but it is just as likely that it could lead to "the purification of the caucasian race."[37] This exercise of conscience can result in evil just as easily as it can result in good. Interestingly, Eisgruber and Sager suggest that the conscience that emerges from religious beliefs is dependent on "schemes of fact and value (epistemologies) that are private in the sense that they do not depend upon their conformity to generally accepted tests of truth or widely shared perceptions of value."[38] Moreover, they insist that the basis of secular conscience "appeals to a public epistemology that depends on generally accepted tests of truth and widely shared perceptions of value."[39] The problem with this distinction is that the conscience opposed to the supremacy of the caucasian race could be based on religious values shared by tens of millions of people, whereas the conscience in support of this supremacy might be held by a very small group of persons who number but a few score. Therefore, their distinction of good and bad conscience is flawed.

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[36] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1291 (1994).

[37] *Id.*

[38] *Id.*

[39] *Id.*

A need to investigate the religious/secular distinction of conscience now surfaces. We can begin this portion of the investigation with the views of Professor Kent Greenawalt. His study of conscience begins with a fundamental assumption that people can exercise conscience that is formed on either religious or non-religious bases.[40] As a person investigates the grounds for claims formed on the basis of conscience, it becomes evident that such claims can be based on religious belief or they can be independent of religious considerations.[41] Therefore it would be false to assume that religious perspectives and claims of conscience are synonymous. The depth and breadth of Greenawalt's perspective expands when Professor David Little's views are taken into account.

Professor Little explains that matters involving the exercise of conscience are not so much affected by a "clash of cultures" as a confusion of them.[42] What intensifies the conflict is not so much a tension between the individual and the state as it is an expression and influence of political and economic factions and the strength of these factions' respective positions on specific issues.[43] In reality, what results is the clash of lobbyists. Meanwhile, the convictions of individuals or the groups to which they belong are ignored. Little asserts that the positions of those who are considered to be minorities or dissenters "are not treated according to the norms of nondiscrimination and freedom of conscience, religion, and belief enshrined in the human rights documents."[44] Furthermore, Little contends that "cultural relativists" have no place for these persons, but what is helping the potential victim whose conscience may be violated is a growing revulsion to the fascist-inspired atrocities of the mid-twentieth century.[45] He characterizes the effect of fascism as

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[40] Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. COLO. L. REV. 965, 966 (2005).

[41] *Id.*

[42] David Little, *Does the Human Right to Freedom of Conscience, Religion, and Belief Have Special Status?*, BYU L. REV. 603, 607-08 (2001).

[43] *Id.* at 608.

[44] *Id.*

[45] *Id.* at 609.

labeling as "subversives" those "who dissented from the collective myth."[46]

Little's thesis may explain a much earlier illustration of conscience, that of Roger Williams, the seventeenth century American who labored for the freedom of religion. Williams's views were reinforced with the conscience argument according to Professor Edward Eberle.[47] He contends that Williams's ideas are crucial to the notions of religious liberty and the exercise of conscience that protects this liberty from coercion by any person or authority.[48] The justification for Williams's idea, as presented by Eberle, is two-fold: this liberty and the conscience that goes along with it are *inviolable* because they: (1) constitute the path to God, and (2) form an inalienable part of the human being.[49] The primacy and guaranty of conscience exist, in Eberle's view, to the extent that they are "consistent with law and order."[50] In defending the primacy of conscience, Williams used powerful language stating that it was "spiritual rape" to coerce individuals into a religion or a belief to which they could not voluntarily pledge themselves.[51] Keeping in mind the famous dicta of *Casey*, referred to earlier,[52] we must consider Williams's assertion about liberty. While he agreed that conscience serves as one's guide in life, he also argued that a person is obligated to follow it since the foundation of conscience is not based on personal preferences but on the will of God.[53] As Eberle puts it, the notion of liberty championed by Williams is "the freedom to do God's will, not the freedom to follow personal choice"[54] as the *Casey* formulation otherwise contends. Another important point that Eberle presents about Williams's notion of conscience is that it is universal and not conditioned on one's faith (Christian, Jewish, Moslem, or some other faith) or culture or civiliza-

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[46] *Id.*

[47] Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289, 290 (2005).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 291.

[52] *See supra* note 23 and accompanying text.

[53] Eberle, *supra* note 47, at 294.

[54] *Id.*

tion.[55] Eberle makes very clear that Williams used the terms "Jews, Turks, Papists, Protestants, pagans" to demonstrate his conviction about the universality of the right to conscience, which was equally guaranteed to those who were not of Protestant, European stock.[56]

A reflective individual might begin to ask some questions about conscience and the degree to which it can be exercised. These reflections can raise a distinction between active and passive exercises of the right to conscience. The active exercise might be characterized in this fashion: "Not only will I disobey the rule that conflicts with my conscience, I will be proactive against the rule; if the rule states that I cannot do something, I will, out of an active exercise of conscience, do that which is forbidden by the law." This could be a legitimate exercise of conscience or it could be the action of a non-conformist. In contrast to the active exercise, the passive exercise of conscience typically surfaces in cases where the person exercises the conscience by stating: "I will not do that which is required, but I will do nothing else contrary to that which is required; I will simply not respond." In the case of active exercise, the state may take action to arrest the activity that the conscientious objector pursues. In the case of passive exercise, the state may coerce the conscientious objector into doing what the rule requires.

Professor Thomas Flynn offers precision to this dichotomy of the exercise of conscience in his examination of civil disobedience.[57] In both active and passive exercises of conscience, there is disobedience to the law. In the case of active exercise it is either doing something when something is forbidden or doing something other than that which is required. With passive exercise, the disobedience is refraining from doing that which is required. Flynn argues that in either case there is disobedience, but the disobedience is directed not toward revolution or upheaval or overthrowing of state, but toward making the state more responsive to the requirements of a just society.[58] Even

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[55] *Id.*

[56] *Id.* at 294-95.

[57] Thomas R. Flynn, *Collective Responsibility and Obedience to the Law*, 18 GA. L. REV. 845 (1984).

[58] *Id.* at 859.

though the conscientious objector in both contexts is disobedient, the objector still remains a citizen who is likely concerned about the welfare of his society and the people who live in it. Professor Flynn suggests that the civilly disobedient is not interested in "dissolving the orchestra," but is intent on making it true to its vocation.[59] While she may seem disruptive, the disobedient musician wants a better, not a worse, music ensemble and is willing to sacrifice through disobedience to achieve this goal, not just for her, but for the common good of all who may be a part of the orchestra or who like to hear its music performed.

Active and passive exercise is illustrated in a story about England and the Second World War. Many years ago when I was a student at Oxford University, an elderly woman who was a retired member of the English faculty at the University befriended me. We would get together from time to time, and she would tell me many stories about her past. She was a woman of profound faith, and she did not miss much about the ups and downs of human existence. She lived in Oxford during the war and escaped the devastation of London during the blitz. One day when we were outside, she looked up into the sky and said that Oxford had been a target of the Luftwaffe since it was an industrial center as well as the home to a great educational and research university. Nevertheless, the city was spared the devastation that leveled much of London. She explained that she thought this was the case because either the Luftwaffe pilots and targeting officers were terribly bad at their craft or they were terribly good and moral men who saved Oxford and its environs. She doubted that they were bad at their craft because her husband had been in the Royal Air Force and informed her otherwise. In one context, the German airmen assigned to bomb Oxford represented passive conscience because they did not deliver the ordnance to the intended targets—they refused to drop the bombs on the city, its center of learning and research, and its industry. But they also represented active conscience because they knew they could not return to their home base with a complement of bombs still on board their aircraft, so they did what they were not supposed to do and probably dropped their

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[59] *Id.*

bombs in the English Channel rather than on the intended targets. Nevertheless, we must recall that challenges to the exercise of properly formed conscience are not relegated to history because they exist in the present day as well.

III. Challenges to Conscience—Domestic and International

A. The Domestic Situation

The exercise of conscience has been examined in many contexts. Professor William Galston has provided a very useful study in an American framework. In his examination of the *Minersville School District v. Gobitis*[60] and *West Virginia State Board of Education v. Barnette*[61] cases, both dealing with the exercise of conscience and the requirement that school children, including those who were Jehovah's Witnesses, to recite the Pledge of Allegiance, he identifies several different attitudes about what is needed to accept or not accept a person's claim of conscience.[62] After his careful examination of American constitutional jurisprudence, he concludes that if liberty of conscience is a fundamental good as most citizens would argue, then the state has the substantial burden of demonstrating when it should not excuse the claimant from compliance with some obligation that the state imposes.[63] A potent illustration upon which he relies is the right from self-incrimination—even the state's reasonable and justifiable search for the truth, i.e., the

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[60] 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[61] 319 U.S. 624. In overruling the *Gobitis* decision, which required school children to salute the flag in violation of their conscience and religious beliefs, the Court in *Barnette* said,

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

[62] *See* William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 Am. J. Juris. 149 (2003).

[63] *Id.* at 172.

objective facts surrounding the case, cannot compel an individual to testify against one's self. These persons may be compelled to testify about matters relevant to a case up to a point, but when the testimony could incriminate them, they are excused because the compulsion to seek the truth cannot force them to "betray their innermost convictions in the name of a state-administered orthodoxy."[64]

After the Pledge of Allegiance cases, the United States Supreme Court had the opportunity to consider an array of legal disputes dealing with young men who claimed conscientious objector status during the Vietnam War. Some of the challengers based their claim to avoid military duty on religious beliefs, while others based their religious claim not on war in general but to a particular war (Vietnam).[65] However, other claimants did not establish their claim on any religious belief, but they maintained their opposition to the draft on the basis of a conscience based on secular humanism.[66] As the Court worked its way through these cases, which often presented different circumstances about and attitudes of the claimants, the decisions reached, while not necessarily in neat accord with one another, gave some indication of how an argument based on conscience could insulate a young man from military service and how it could not. Today, in the early twenty-first century, an emerging issue pertaining to conscience involves medical personnel and pharmacists who may object to certain medical practices, in particular, abortion or assisted suicide/euthanasia, or distribution of pharmaceuticals that would destroy nascent human life.[67]

Recently, ominous developments regarding "conscience exceptions" have been emerging, and the United States Congress and individual state legislatures have been responding. Abortion providers, such as the Planned Parenthood Federation (PPF), have been alarmed by the exercise of conscience clause protections invoked by pharmacists, physicians, and other health care providers to excuse them from giving "emergency

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[64] *Id.* at 173.

[65] *See* Gillette v. United States, 401 U.S. 437 (1971).

[66] *See* United States v. Seeger, 380 U.S. 163 (1965).

[67] *See, e.g.*, Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83 (2006).

contraception" to women who request these agents. PPF has argued, "Prescription refusal is a disturbing trend that can jeopardize woman's (sic) reproductive health."[68] PPF further noted that "access to reproductive health care diminishes as an increasing number of non-religiously affiliated hospitals are merging with Catholic hospitals."[69] PPF has asserted that while it believes that individuals "have the right to their own opinions and moral beliefs, it is unethical for health care providers to stand in the way of a woman's access to safe, effective, legal, and professional health care."[70] PPF supported the efforts of Illinois Governor Rod Blagojevich who promulgated an executive order requiring health care providers and pharmacies in Illinois to dispense "emergency contraception" and other birth control pharmaceuticals.[71] It is clear that many of the health care providers who have objected to prescribing or dispensing abortifacients are doing so out of conscience or religious or moral conviction. In 2006, PPF brought a lawsuit against forty-eight Wal-Mart pharmacies in Massachusetts because they did not stock and sell the "morning after" pill.[72] PPF's lobbying efforts proved successful in that the Massachusetts Pharmacy Board ordered the Wal-Mart pharmacies to carry and sell "emergency contraception."[73]

When the state has alternatives to obtain the goals associated with programs that many citizens find controversial and

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[68] *See Refusal Clauses: A Threat to Reproductive Rights*, FACT SHEET (Planned Parenthood Fed'n of Am., New York, N.Y.), Dec. 2004, at 1, *http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/birth-control-access-prevention/refusal-clauses-6544.htm*.

[69] *Id.* at 2.

[70] *Id.* at 4.

[71] Kari Lyderson, *Ill. Pharmacies Required to Fill Prescriptions for Birth Control*, WASH. POST, Apr. 2, 2005, at A2, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A19703-2005Apr1?language+printer. NARAL Pro-Choice and other "reproductive rights" lobbies have also been hard at work supporting the Illinois Governor's initiative, which is now facing legal challenges.

[72] *See EC Access at Wal-Mart Demanded*, PRESS RELEASE (Planned Parenthood Fed'n of Am., Wash. D.C.), Feb. 3, 2006, http://www.plannedparenthood.org/newsroom/politics-policy-issues/EC-Access-at-Wal-Mart-Demanded.htm.

[73] *See Pill Patrol Victory at Wal-Mart*, PRESS RELEASE (Planned Parenthood Fed'n of Am., Boston, Mass.), Apr. 10, 2007, http://www.plannedparenthood.org/ma/pill-patrol-victory-at-wal-mart.htm; *see also* Mass. Dep't of Pub. Health, Pharmacy Bd. Policy No. 2006-1 (2006), *available at* http://www.mass.gov/Eeohhs2/docs/dph/quality/boards/pharmacy_ec_policy_pharmacist_dispensing.pdf.

indefensible, should it not respect the innermost convictions, the conscience, of those persons who choose to be excused from participation in programs many conclude are objectionable? This would appear to be especially true when there are medical providers and pharmacists who are available to perform the services demanded by a clientele whom conscientious objectors choose not to serve. To put the point candidly: if some are willing to take actions that threaten human life and the law states that these actions are legal, should the law not also recognize and respect those members of the society who, in the exercise of conscience, elect not to participate in these otherwise legal and available "services"? The proper answer would appear to be yes. For instance, if criminal defendant Jones testifies that he was at home reading a stimulating law review article rather than disturbing the peace at Fourth and Main at the time of the incident about which a complaint has been lodged, could not the witnesses who saw Jones at this venue or at some other venue enable the state to effect its purpose without probing the inner thoughts of Jones? If the legislature has the competence to say the governor is the head of the state, why should the citizen be required to swear a public oath that this is indeed the case?

B. The International Context

For the purposes of this essay, the substantive discussion concerning conscience in the international legal realm needs to begin with consideration of Article 18 of the Universal Declaration of Human Rights (UDHR) which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[74] The rights conferred by this text have both public and private dimensions. There is the private component of "innermost conviction," and there is the public expression of it. Article 18 of the International Covenant on Civil and

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[74] Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810, art. 18 (Dec. 10, 1948).

Political Rights (ICCPR)[75] duplicates, with small adjustments, this provision from the UDHR. Unlike the UDHR, the ICCPR contains a limitation on the exercise of this right. Article 18.3 of the ICCPR indicates that there can be some restriction on the right to religion and beliefs that are (1) prescribed by law and (2) "are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[76] But this limitation must also be understood under the "non-derogation" provisions of Article 4 of the ICCPR, which specifically applies to the provisions of Article 18.

Any study of the UDHR should keep its drafting history in mind. The Lebanese delegate Charles Malik, who was a principal drafter of the UDHR,[77] endorsed the view that the article of the UDHR addressing religious freedom and conscience must acknowledge the right of different human convictions "to exist in the same national entity" as obligated by international law.[78] Following the guidance of Malik, the drafters took steps to emphasize that these rights were not only private but also had a civic or public component.[79] The drafters essentially agreed that

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[75] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, art. 18 (1966), *entered into force* Mar. 23, 1976. The article reads in its entirety:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Id.

[76] *Id.* art. 18.3.

[77] *See generally* MARY ANN GLENDON, A WORLD MADE NEW (Random House 2001).

[78] JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT 260 (Univ. of Pa. Press 1999).

[79] *Id.*

the substance of Article 18 of the UDHR respects "pluralism and openness to different perspectives."[80]

The drafters of the UDHR realized that no one could ever really know what beliefs or thoughts a person had, unless of course they were extracted by unlawful means such as torture, but they also acknowledged that a person's innermost convictions would mean little if the holder had to endorse a contrary position in a public forum. As Professor Morsink concludes in his study of the *travaux prèparatoires* of the UDHR, "Behind this seemingly innocuous right lies the profound right not to be compelled to profess a belief or ideology which one does not hold."[81] The drafters of the UDHR concurred with René Cassin, a French delegate and member of the drafting committee, that a person should not be compelled to do something indirectly that one could not be forced to do directly.[82] This brings the present discussion to a recent development within the European Union that, in spite of statements to the contrary, conflicts with these important principles protecting thought, conscience, and religious belief across the world.

On December 14, 2005, the EU Network of Independent Experts on Fundamental Rights (Network)[83] issued Opinion No. 4-2005, titled: *The Right to Conscientious Objection and the Conclusion by the EU Member States of the Concordats with the Holy See*.[84] The European Commission requested the opinion of the Network in July of 2005 on the legal status of religious conscientious objection in existing and future concordats between

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[80] *Id.*

[81] *Id.* at 261.

[82] *Id.*

[83] The Network was established in 2002 by the European Commission in response to a recommendation in a European Parliament's report on the state of fundamental rights in the EU, (2000/2232 INI). *See* A Network of Independent Experts to Assess the Safeguarding of Fundamental Rights by the European Union Member States, http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm. The Network's membership includes one expert per Member State of the EU. *Id.*

[84] E.U. NETWORK OF INDEP. EXPERTS ON FUND'L RTS., CFR-CDF OPINION NO. 4-2005: THE RIGHT TO CONSCIENTIOUS OBJECTION AND THE CONCLUSION BY EU MEMBER STATES OF CONCORDATS WITH THE HOLY SEE 1 (Dec. 14, 2005), http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf [hereinafter NETWORK OPINION NO. 4-2005].

EU Member States and the Holy See.[85] The European Commission, in its request to the Network, posed three questions: (1) do these agreements take primacy over national law, including national constitutions?; (2) what are the means by which concordats produce effects and how might they be terminated?; and (3) do conscience clauses in concordats create incompatibilities with fundamental rights of individuals and the law of the EU?[86] This last question is the crucial one and will be studied here in some depth.

In brief, the following points can be made about the opinion of the Network. First, the Network equates the right of conscience exercised by one person with the claim made by another person to a "right" to reproductive health services including access to abortion.[87] While giving lip service to the right to conscience of the person objecting to abortion on the one hand, the opinion takes the position that abortion access, which is not mentioned as a "right" in the UDHR, the ICCPR, or any other human rights instrument, is nonetheless equivalent to a person's right to conscientiously oppose abortion.[88] In making this argument, the Network relies on a peculiar interpretation of the applicable instruments and the UDHR while at the same time ignoring an important aspect of the one right that they specify, i.e., the right to life of a new human.[89] For instance, where the opinion mentions the right to life protected by Article 6 of the ICCPR, it does so not in the context of human life *in utero* but the dangers of "illegal abortions performed in unsafe conditions."[90] The Network insists that there is an "emerging consensus" that there exists a right to interrupt a pregnancy based on the advocacy of the Center for Reproductive Rights in a legal challenge involving Poland,[91] a country where a large majority of the population happens to be Catholic.

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[85] *Id.* at 4.
[86] *Id.*
[87] *Id.* at 27, 30-31.
[88] *Id.* at 34.
[89] *Id.* at 19.
[90] *Id.*
[91] *Id.* at 19 n.52.

With regard to the first question raised by the European Commission and identified earlier in this section, the Network does not establish how it might have the competence to judge whether any treaty, including a concordat, takes precedence over national law. However, the Network does suggest that concordats can take precedence over national law.[92] By the same token, the Network offers its view that "international law" and EU law can trump the lawmaking authority of its Member States, which includes the substance of bilateral treaties that Member States enter.[93] Hence, treaties and concordats can, in the view of the Network, be trumped by EU and "international" law.

Concerning the second question, the Network concedes that the Holy See is a subject of international law and is legally competent to conclude international agreements that have the status of treaties.[94] Moreover, the Network also concedes that the Holy See's diplomatic relations reinforce its competence to make treaties or concordats.[95] It would appear, then, that the Network concedes that concordats are binding instruments of international law, which a party can breach or terminate in accordance with applicable provisions of international law.

The third issue, whether concordats containing provisions protecting the right to religious conscientious objection are compatible with the protection of "fundamental rights" and EU law that raises serious consequences for the Holy See and the integrity of its concordats. The Network concludes that the concordat clauses it reviewed are incompatible with "international" and EU law and the "fundamental rights" to be enjoyed there under.[96] In making this assertion the Network concedes that conscience is a right that is protected under various human rights instruments and the law of the EU;[97] however, it is only one of several rights that are protected, and the protections accorded to conscience, including claims to conscience based on religious

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92 *Id.* at 6.
93 *Id.* at 6-15.
94 *Id.* at 5-6.
95 *Id.*
96 *Id.* at 20-23.
97 *Id.*

beliefs, are therefore not absolute.[98] The Network asserts that the limited right to conscience based on religious belief must be balanced with other rights that address concerns of other individuals who make claims for same-sex unions,[99] "reproductive health rights," abortion, euthanasia, artificial fertilization, and artificial contraception.[100]

The Network examines the exercise of conscience under many of the EU Members States' national laws, and it concludes that the protection of conscience is but one consideration in protecting the rights of persons under national and international law.[101] While the Network does not claim the competence of judging legal questions solely under the law of Member States, it does claim the competence to determine how national laws addressing the exercise of conscience are to be interpreted under international law and EU law. In addition to the European Convention on Human Rights (ECHR), the Network based its opinion on elements of the two 1966 human rights instruments, the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[102] In relying on international instruments, the Network spends a great deal of time with Article 18 of the ICCPR and Article 9 of the ECHR, both of which recognize the right of thought, conscience, and religion.[103] With regard to religious beliefs, the Network makes the distinction between internal private belief, which seems to enjoy unlimited protection, and

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[98] *Id.*

[99] In early February, 2006, it was reported that a federal panel of judges in Spain rejected the petition of a justice of the peace in Valencia to abstain from presiding over "civil marriages" between same-sex partners. *See Federal Court Orders Justice of the Peace in Valencia to Preside at Homosexual "Weddings"*, CATHOLIC NEWS AGENCY, Feb. 9, 2006, *available at* http://catholicnewsagency.com/new.php?n=5963. By a vote of three to two, the federal panel refused to acknowledge the justice's right to conscientious objection and ruled that "Judges and Magistrates can never exercise the right to conscientious objection, as they are obliged to follow the rule of law." *Id.* "The justice in Valencia has no other recourse to abstain from presiding at homosexual unions. Last December a justice of the peace in the city of Pinto opted to resign rather than preside at such ceremonies." *Id.* Interestingly, Spain is a party to the ICCPR.

[100] NETWORK OPINION NO. 4-2005, *supra* note 84, at 22-23.

[101] *Id.* at 16.

[102] *Id.* at 15.

[103] *Id.*

external manifestations where the private beliefs are translated into words or actions, which receive less protection because these exercises must be balanced with the exercise of other "rights."[104]

The Network asserts that while religious conscientious objection is protected by reasonable accommodation, the protection of this exercise is not unlimited.[105] The Network bases its claim on the argument that the exercise of religious conscientious objection can conflict with other rights that are also recognized under international law.[106] The Network opines that: when rights conflict, a balance between competing claims "must be struck."[107] The Network then "strikes this balance" when the conscientious claims that emerge from Catholic teachings conflict with other rights.

Relying on the jurisprudence of the United Nations Human Rights Committee, which exercises certain functions under the ICCPR, the Network states that it is necessary to determine if the exercise of religious conscientious objection would cause any discrimination infringing on the exercise of some other protected rights.[108] If there is "discrimination" generated by the claim to conscience based on religious belief, a balancing of the conflicting claims is necessary to avoid conflict between the competing claims asserted by different parties.[109] The Network then looks at religious conscientious objection in the context of access to abortion services that might be affected by respecting a person's exercise of conscience.[110]

With regard to access to lawful abortion services, the Network begins its "balancing" by targeting "restrictive" national abortion laws.[111] The Network reflects the position of the United Nations Human Rights Committee, as demonstrated in the latter's country-specific reports, that countries with restrictive abortion legislation are violating women's "reproductive

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[104] *Id.* at 15-16.
[105] *Id.* at 16.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 17.
[109] *Id.* at 16.
[110] *Id.* at 17-18.
[111] *Id.* at 18.

rights."[112] In particular, the laws of Poland are subjected to the Network's probing critique.[113] The Network endorses the Human Rights Committee's determination that Poland "should liberalize its legislation and practice on abortion."[114] The Network points out that Polish laws dealing with abortion are influenced by "conservative parties linked with the anti-abortion policy propagated by the Catholic Church."[115] A part of this "problem" for the Network is the existence of conscientious objection clauses that are an integral element of Poland's laws.[116]

The Network is careful to note that the European Court of Human Rights, in interpreting the ECHR, has not *yet* concluded that there is a general "right to seek abortion."[117] However, the Network does not conceal its preference that "the right to seek the interruption of pregnancy must be recognized to women where the continuation of pregnancy would seriously threaten their health."[118] In essence, the Network, purportedly relying on "the current state of international human rights law,"[119] asserts that the right to life contained in Article 6 of the ICCPR must be used to protect women who have no alternative but an "illegal abortion performed in unsafe conditions."[120] No mention is made about extending the same Article 6 protections to the right to life to the child who would be the object of the abortion, whether the abortion is a legal one or not. The Network also asserts that not providing an abortion where it is lawful constitutes an "infliction of an inhuman and degrading treatment" prohibited by Article 7 of the ICCPR.[121] The Network then relies on the recent "report" of the Human Rights Committee involving the matter of *Huamán v. Peru*.[122]

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[112] *Id.* at 18-22.
[113] *Id.* at 21-22.
[114] *Id.* at 18.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 19.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 20 (citing Human Rights Comm., Huamán v. Peru, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005)).

In that proceeding, The Human Rights Committee concluded that Peru had violated the claimant's rights under ICCPR Article 2 (discrimination), Article 6 (right to life), Article 7 (torture or cruel, inhuman or degrading treatment or punishment), Article 17 (arbitrary or unlawful interference with privacy), and Article 24 (rights of the child under the ICCPR).[123] The claimant in this matter was considered to be a child, because she became pregnant when she was seventeen.[124] The child she was carrying was diagnosed with a fetal abnormality that could lead to the early death of the infant.[125] While one attending physician recommended termination of the pregnancy, the hospital indicated that this was not permitted under the applicable Peruvian law due to the advanced stage of the pregnancy and the conditions under which a termination of pregnancy is legally permitted.[126]

Two of the arguments made by the claimant through her legal counsel, the Center for Reproductive Rights, which was the same NGO which supplied assistance to the Network in its opinion, addressed the mother's "right to life" under Article 6 and her "right to protection as a child" under Article 24.[127] At no time did the Committee or legal counsel extend these rights to the baby who, incidentally, survived for four days after her birth. The Committee agreed with the mother's legal counsel "that the right to life cannot be interpreted in a restrictive manner,"[128] even though her life was never threatened by the pregnancy. The mother's counsel also claimed that Peru denied her a "safe termination of pregnancy" basing their argument on the fact that the fetus was not viable.[129] The facts of the case demonstrate this was not true, since the baby was delivered and lived for four days; moreover, the mother breast-fed her baby during this period.[130] Although the Committee applied the Con-

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[123] *Id.* (citing Human Rights Comm., Huamán v. Peru, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005)).

[124] *Id.*

[125] *Id.* at 4.

[126] *Id.*

[127] *Id.* at 6-7.

[128] *Id.* at 6.

[129] *Id.*

[130] *Id.* at 5.

vention on the Rights of the Child to the mother, it failed to apply this instrument to the infant who, under Article 6, was also entitled to the right to life; who, under Article 19, was the beneficiary of Peru's law designed to protect children from violence; and who, under Article 23, was entitled to protection as a disabled child.[131] Moreover, the Committee failed to consider Article 41 of the Convention on the Rights of the Child which required Peru to protect the rights of all, not just some, of the children involved in this proceeding; so much for balancing competing claims.

In writing its opinion on the status of concordats, the Network also took into account General Recommendation No. 24 under the CEDAW regime which considers it discriminatory when states' parties refuse to provide "reproductive health services for women."[132] One reproductive health service is abortion, at least in those states where it is legal. The Network explains how the mosaic of human rights law is to be applied when competing rights claims fundamentally conflict:

> In sum, whether the *right to religious conscientious objection* is recognized explicitly in a concordat, or whether it is derived from the guarantee of freedom of religion stipulated in international human rights instruments, in the national Constitution or in specific legislation, this right *should be regulated in order to ensure that, in circumstances where abortion is legal, no woman shall be deprived from having effective access to the medical service of abortion.* In the view of the Network, this implies that the ***State concerned must ensure***, first, that an effective remedy should be open to challenge any refusal to provide abortion ; second, *that an obligation will be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion* ; third, that another qualified health care practitioner will be indeed available, including in rural areas or in areas which are geographically remote from the centre. Such a regulation should thus accommodate the right to religious conscientious objection, which is derived from the

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131 *Id.*

132 *Id.* at 20.

> freedom of religion, while ensuring that the exercise of this right will not lead to others either being deprived of access to certain services in principle available to all in the State concerned, or being treated in a discriminatory fashion.[133]

It is clear from the Network's opinion that the right to claim conscientious objection based on religious belief is at best a qualified right. Any state law that includes a conscience clause in a concordat with the Holy See is subject to being "corrected" to ensure that no discrimination exists against women who choose to exercise their legal "reproductive health rights."

With regard to "other fundamental rights," conscience clauses may also be subject to regulation under the views of the Network. The Network quickly passes over matters involving "euthanasia" and "assisted suicide," since they have not been declared by the European Court of Human Rights as a fundamental right, for the time being.[134] However, the Network notes that a partial decriminalization of euthanasia and assisted suicide would necessitate the reexamination of conscience clauses dealing with these subjects since no one should be deprived of a right that exists under the law; therefore, it would once again be necessary to "balance" conflicting rights.[135] The grip on the exercise of conscience tightens when the Network states in its opinion that in those states where euthanasia and assisted suicide are "partially decriminalized," conscientious objectors should not be protected in a way that deprives "any person from the possibility of exercising effectively his or her rights as guaranteed under the applicable legislation."[136]

The Network also appears inclined to place restrictions on the rights of pharmacists who, based on conscience, claim exemption from selling contraceptives, including "morning after" pills.[137] The Network is much clearer about matters involving sexual orientation. The Network comes close to endorsing the Netherlands's position that "any form of discrimination on the

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[133] *Id.* (emphasis added).
[134] *Id.* at 22.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 23.

basis of sexual orientation . . . should not be tolerated."[138] As it stated in its opinion under examination:

> The Network would also emphasize that *in no circumstance* could it be justified for a church or a religious organisation to discriminate against a person on the basis of his or her sexual orientation, whatever the condemnation of homosexuality, on religious grounds, by those organizations. . . . [E]ven where it may be justified to consider religion or belief as a genuine occupational requirement, this may not justify discrimination based on another ground. Neither could [a specified EU conscience] Directive . . . be relied upon by a church or a religious organisation to justify not employing, or otherwise discriminating in employment and occupation, a person on the basis of his or her sexual orientation, whether that sexual orientation is hidden or not. Although churches may exercise rights such as freedom of religion or freedom of expression—and in that sense, among the 'rights and freedoms of others', are the rights of those organizations -, any invocation of freedom of religion or of freedom of expression in order to seek to justify discrimination against homosexuals constitutes an abuse of rights, in the meaning of Article 17 of the European Convention on Human Rights.[139]

To reinforce its view, the Network relies in part on the "Diversity and Equality Guidelines" issued in February of 2005 by the Catholic Bishops' Conference of England and Wales.[140] In the context of sexual orientation, Guideline 6 states in part: "Only a person's qualifications and ability to do their job should determine decisions about recruitment, retention and promotion."[141] The manner in which the Network relies on this text from the English Church would support the view that the Church has the right to insist that a candidate for the priesthood be Catholic; however, it has no right to discriminate against him based on his "sexual orientation."[142] The fact that the guidelines of the English Church were written in the context

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138 *Id.* at 22-23.
139 *Id.* at 26 (emphasis added).
140 *Id.*
141 *Id.*
142 *Id.*

of "employment" would probably have little bearing on arguments made by the Church that the ordination of priests is not a question of employment, but rather a call to a religious vocation. However, in the Network's estimation, the only legitimate occupational qualification concerns whether the candidate is a Catholic; the sexual orientation of the candidate would not be a legitimate inquiry for the Church to pursue or consider.[143]

It is relevant to note that the opinion of the Network was requested approximately four months before the *Instruction: Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders*, dated November 4, 2005, was issued by the Congregation for Catholic Education.[144] In this important document, the Catholic Church addressed the question "whether to admit to the seminary and to holy orders candidates who have deep-seated homosexual tendencies."[145] The Congregation for Catholic Education concluded that, in light of the Church's teachings, men who "practice homosexuality, present deep-seated homosexual tendencies or support the so-called 'gay-culture'" cannot be admitted to seminaries or be ordained into the priesthood.[146] In presenting this view, the Congregation noted that the Church profoundly respects these men; nevertheless, they cannot be prepared for nor admitted to holy orders.[147] The Opinion of the Network was released on December 14, 2005,[148] and the *Instruction* was released on November 29, 2005.[149] While it would be speculative to reach a conclusion about the Network's actual view on the

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[143] *Id.*

[144] Congregation of Catholic Education, *Instruction: Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders* (Nov. 4, 2005), http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html [hereinafter *Instruction*]. The Congregation for Catholic Education is the office of the Roman Curia of the Catholic Church, headquartered in Rome, responsible for exercising the Church's authority that pertains to the work of Catholic educational institutions including seminaries.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] NETWORK OPINION NO. 4-2005, *supra* note 84, at 1.

[149] *Instruction*, supra note 144.

Instruction at this time, the Network's statement, quoted above, on the protection of "sexual orientation" strongly indicates how it might deal with the matter of the "legality" of the *Instruction* should it ever arise. It would be logical to conclude that the Church's *Instruction* would, in the Network's view, be in violation of the law regarding the rights of homosexuals.

The Network concludes its opinions by raising "certain fears" concerning the concordat between the Holy See and the Slovak Republic on conscientious objection by Catholics.[150] After briefly commenting on points it made earlier, the Network states that "the most serious threat" posed by the conscientious objector language in the concordat with the Slovak Republic is "its potential impact on the right to have access to certain medical services."[151] While noting that both individual Catholics and the Church itself have the right to conscientious objection, the Network places a limitation on this right in the context of using conscience to deny "certain medical services."[152] In presenting this perspective, the Network questions the soundness and validity of a 1989 European Commission on Human Rights decision enabling a Catholic hospital in Germany to adopt sanctions against one of its doctors who had publicly criticized the Church on its abortion stance.[153] The Network makes the point of saying it could not predict whether the European Court of Human Rights would reach this conclusion today if a similar case were to come before it.[154] The Network asserts that unless the state is able to guarantee alternatives to the patient so that the patient can receive lawful "reproductive health services," the right to exercise the objection based on conscience "goes counter to the international undertakings" of EU Members.[155] This means that the conscientious objector would probably have to provide information to the patient, as to where he or she could go to receive the services the conscientious objector declines to provide, which would make the objector an accomplice to the thing ob-

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150 NETWORK OPINION NO. 4-2005, *supra* note 84, at 28.
151 *Id.* at 30.
152 *Id.*
153 *Id.* at 30 n.88.
154 *Id.*
155 *Id.* at 31.

jected rather than a participant. But this too would conflict with the right to exercise one's conscience; for such an individual would be contributing to the very thing that his or her conscience objects.

The Network casts one final shadow on the conscience clauses that have been incorporated in recent concordats. In its view such clauses can enable Member States of the European Union, and candidate countries such as the Slovak Republic, to violate international obligations.[156] This, of course, depends on acceptance of the Network's interesting but flawed interpretation of international instruments. The alleged violations, according to the Network, would surface from restrictions on access to reproductive health counseling and related medical services including abortion and contraception "which disproportionately affect women."[157] Although the opinion of the Network, by itself, is not a legally binding text, it is a forecast of things that may be in the future. At the least, the opinion reflects the views of influential voices within the EU today. The Network's opinion suggests that coercion, a method used by totalitarian regimes of the not-too-distant past, may be a tool of the modern state or union of states to address and restrict the exercise of conscience. If there is merit to this argument, it would be relevant to consider whether a new form of totalitarianism is emerging in today's twenty-first century, particularly where longstanding rights, such as the right of conscience, are being defeated by claims in support of new "rights." These new "rights" are, in effect, nothing more than the views of political activists which they wish to force upon the rest of society.

IV. THE PROBLEM—A NEW FORM OF TOTALITARIANISM

In a sense we live in a world of positive law, where typically legislative bodies promulgate or posit the law. This is an accepted way of life in democratic cultures. It is also possible that administrators, through the drafting and implementation of regulations, can also participate in the making or positing of

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156 *Id.* at 32.
157 *Id.*

law. Again, this is something that is compatible with democracy. Moreover, positive law is the vehicle by which the natural law of right reason and objectivity is implemented. As Professor Blake Morant has argued, human, i.e., positive, law can augment or complement the natural law's goal of properly ordering society for the benefit of one and all.[158] Morant states, "[P]ositive laws can provide a utilitarian functionality to natural law principles."[159] The problem is that a singular reliance on positive law, unchecked by the application of right reason, leads to positivism, and this raises the concern addressed by Hart, in his discussion of the Nazi regime and post-war Germany, of which he stated, "Wicked men will enact wicked rules which others will enforce."[160] Even Hart, a strong advocate of positive law, conceded that in dealing with such an abuse of power and lawmaking authority, obedience is not simply contingent on "legal validity," it may also require some kind of moral scrutiny that is beyond the official system.[161]

With this, Morant's analysis comes back into play. In his study, he does not address Nazi Germany, but instead addresses Tudor England and the conflict between King Henry and Thomas More. Morant argues that More refused to endorse King Henry's positive law that altered or displaced the natural law, which previously gave[162] order to society.[163] From More's perspective it was not only possible, but necessary, for the law the King and Parliament made to reflect the harmonious relationship between human law and the law of right reason or the natural law.[164] Although the latter transcended the former, it could also inspire the positive proclamation. In More's mind the connection between the two bodies of law was both necessary and compatible. But the Act of Succession, sought by the King and enacted by Parliament, unsettled this balance. More de-

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158 Blake D. Morant, *Lessons from Thomas More's Dilemma of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations*, 78 ST. JOHN'S L. REV. 965, 978 (2004).

159 *Id.* at 981.

160 HART, *supra* note 5, at 206.

161 *Id.*

162 *Id.* at 979-80.

163 Morant, *supra* note 158, at 981-82.

164 *Id.*

cided to ignore the Act, which would continue on its course without any further expression of opinion from him.[165] Perhaps that would have been to his liking; however, the King demanded a public endorsement, and therein laid the problem.[166] Not the reason for the law, but rather the King's and Parliament's ability to enforce it became the justification to obey the law. As Morant notes, in a positivist sense, there is no problem with this approach.[167] The problem begins to emerge when this approach is subject to moral scrutiny.[168] The King and Parliament would not permit this, and they concluded that private views critical of the Act had to be neutralized by a public oath of allegiance proclaimed by the citizens and by those like Thomas More in prominent positions within society.[169]

The oath that Thomas More refused to take would expose his innermost conviction that the Act was seriously flawed. If no one knew this, the law and More's life could continue. But when his public allegiance became a crucial element of the Act's success, King Henry's England became a totalitarian state in which conscience was no longer a protection for inner conviction. For the King, this circumstance was "a canker in the body politic, and he would have it out!"[170]

In this segment of the investigation of conscience, I consider totalitarianism as a type of modern dictatorship that relies on a centralized, universal control of all aspects of life including "innermost convictions."[171] The totalitarian state can conjure up means of ensuring public endorsement of its control, demanding uniform support by all over which it exercises dominion. In a way, the oath required by the Act of Succession might be con-

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[165] *Id.* at 981.

[166] *Id.* at 982-83.

[167] *Id.* at 982-83.

[168] *Id.* at 980 n.59.

[169] *Id.* at 989 n.119.

[170] A MAN FOR ALL SEASONS (Columbia Pictures 1966).

[171] *See* CARL J. FRIEDRICH & ZBIGNIEW K. BRZEZINSKI, TOTALITARIAN DICTATORSHIP AND AUTOCRACY (2d ed. 1965); HANS BUCHHEIM, TOTALITARIAN RULE: ITS NATURE AND CHARACTERISTICS (Wesleyan Univ. Press 1968); HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (Harvest Books 1973) (1951); MICHAEL CURTIS, TOTALITARIANISM (Transaction 1979); STEVEN PAUL SOPER, TOTALITARIANISM: A CONCEPTUAL APPROACH (Univ. Press of Am. 1985); ABBOTT GLEASON, TOTALITARIANISM: THE INNER HISTORY OF THE COLD WAR (Oxford Univ. Press 1997).

sidered an early illustration of this because there could be no departure from disagreeing with the law, and to ensure this, the oath was required. It typically is in the nature of the totalitarian state to coerce its subjects into cohesion with the views of the state, and the oath required by the Act of Succession was written to guarantee this. Nonetheless, in spite of this effort at universal, central control, there often remain elements of the society that preserve a moral force and function as a counterpoint to the pressure of this state. In the context of Nazi Germany and the Soviet Union there were religious and intellectual groups who served as counterpoints. By pursuing their goals, the members of these groups faced persecution and annihilation if discovered by the state's enforcement mechanisms.

Christopher Dawson, who spent a career studying conscience, religious faith, and public life, noted that in more modern times, Christianity needed to become an underground movement.[172] But in reality, Dawson concluded that Christianity as a way of life and the exercise of conscience that accompanies the practice of Christianity cannot always be concealed. He recognized that both the totalitarian state and the modern democratic state may "not [be] satisfied with passive obedience; it demands full co-operation from the cradle to the grave."[173] In some contexts, this obedience is necessary to avoid being "pushed not only out of modern culture but out of physical existence."[174]

Dawson's investigation of the first half of the twentieth century may be an accurate prophecy for the democracies of the early twenty-first century. The views and beliefs of conscience that are targeted today need not be held by a few isolated individuals, since they can be and likely are held by many other persons. In this context, the hallmark of the totalitarian regime is its plan to eradicate beliefs and acts that may be held by many individuals and are often considered mainstream, but conflict

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[172] CHRISTOPHER DAWSON, CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON 81 (Gerald J. Russello ed., Catholic Univ. of Am. Press 1998). Much of Christopher Dawson's work had as a backdrop the totalitarian states of Nazi Germany and the Soviet Union.

[173] *Id.*

[174] *Id.*

with the views of the state or those political interests that effectively lobby the state in its lawmaking function. Surely, this is the case with perspectives on abortion, same-sex marriage/unions, euthanasia, and "emergency contraception" that are becoming not only the policies but the requirements of the modern democratic state. These are not only interesting times; they are challenging times as well. And how should these challenges be met? With resignation? With defiance? Or, with the reasoned response of conscience?

V. A HOPEFUL RESPONSE?

If, in contemporary society, there is freedom for "choice" exercised by an individual to take the life of her baby *in utero*, why should the same society prevent freedom of choice for an individual who does not wish to participate in this action? If this society protects the freedom to marry whomever one wishes to marry regardless of their sex, should there not also be the freedom to say that there is a problem with this attitude? If there is freedom for a person to take one's own life, should there not also be the freedom to protect those who refuse to participate in taking life? I return to the "mystery of life passage" from *Planned Parenthood v. Casey*.[175] Some might argue that this represents the evolution of the liberal state, but others would suggest that this is not the case. They would argue that this instead represents a reversion to totalitarianism where all must endorse positions that run contrary to a well-formed conscience. As Professor Smith has contended, Roger Williams's understanding of "freedom of conscience" might well be the foundation of modern liberalism pitted against the totalitarian regime.[176]

Today, if society would approve of the doctor who, in the exercise of his conscience, refused to conduct some scientific experiment upon an unwilling subject that is encouraged or required by the law of the totalitarian state to submit, why would that same society disapprove of the doctor who, also in the exer-

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[175] 505 U.S. 833, 847 (1992); *see also supra* notes 23-24 and accompanying text. As Professor Steven D. Smith notes, the *Casey* decision "invoked the sanctity of conscience as a central rationale for a right to abortion." Smith, *supra* note 21, at 325.

[176] *Id.*

cise of conscience, refused to terminate a life at an early stage or a later stage? Put simply, this society's action would not make sense if it insists on being called democratic and liberal. It would be guided by subjective whim and caprice, and, notwithstanding its democratic claims, be a totalitarian society. As Pope John Paul II once said, "the value of democracy stands or falls with the values which it embodies and promotes."[177] What values are being promoted today by "liberal democracies"? Are they truly consistent with the principles, including the right to conscience, that undergird them?

If some are prepared to cheer the physician depicted in the film "The Cider House Rules" who, in the exercise of his ether-molded "conscience," would abort the babies of young, unwed mothers who came to him for "help,"[178] why could they not also commend the physician who, in the exercise conscience, refuses to associate with such actions? Perhaps because, as Dr. Edmund Pellegrino has cautioned, the first context offers an "immediate utopianism of a man-made heaven on earth" where there is nothing beyond the present moment.[179] In his view, the approach of this utopianism determines the secular society's choices about what is permitted and what is not.[180] As physician and ethicist, Pellegrino has admonished liberal democracies that these approaches parallel those of totalitarian systems that subverted the use of medical knowledge to further particular political and economic purposes that are riddled with grievous errors.[181] In particular, he laments the decision in *Roe v.*

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[177] Pope John Paul II, Encyclical Letter Evangelium Vitae, ¶ 70 (1995). In his earlier encyclical letter Centesimus Annus of 1991, he made a related observation: "As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism." Pope John Paul II, Encyclical Letter Centesimus Annus, ¶ 46 (1991).

[178] THE CIDER HOUSE RULES (Miramax Pictures 1999).

[179] Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221, 224 (2002).

[180] *Id.*

[181] *Id.* As Dr. Pellegrino points out:

> We need not recite again the way the Soviet Union distorted the Hippocratic Oath to make it serve the purposes of Communism, the Nazi physicians' acquiescence in using their knowledge in the service of genocide, or the participation of physicians as instruments of torture or terrorism by so many petty dictators and war lords. The laws and social conventions of pathological societies justified all these violations of the ethics of medicine.

Wade that effectively removed all, not just some, prohibitions against abortion.[182]

Under the guise of removing physicians from criminal liability, *Roe v. Wade* has been the basis of a constitutional right to an abortion, something which Justice Blackmun's majority decision, in fact, did not assert. Nonetheless, Pellegrino reminds us that the decisions in *Roe* and its progeny are "morally repugnant to many physicians and to the public."[183] If there is any question about this, one need only consider the number of occasions in which the United States Congress and individual state legislatures have attempted to regulate and restrict the practice of abortion, but their efforts were subsequently vetoed by judicial mandate citing the "constitutional right" of a woman to have an abortion. One need only consult *Stenberg v. Carhart*[184] to take into account the degree to which judges are capable of affording legitimacy to a particularly barbaric form of abortion that one state attempted to outlaw. For the time being, the legislative provisions exempting physicians from participation based on the exercise of conscience appear to remain intact, but if the lawsuits involving conscientious objection claims of pharmacists are any forecast, a chill wind is beginning to precede a storm. Is there any hope that the law might properly respond?

Thomas Aquinas argued that the first principle of the law is to do good and avoid evil.[185] This principle provides a useful means to address the question I have just posed. This first principle necessitates that the person who exercises conscience must correctly identify what the authentic good is. Otherwise, as Dr. Pellegrino states, errors of conscience can occur when individuals or groups relying on the conscience defense misidentify the good.[186] If the good is misidentified, the subsequent acts based on conscience, be it an active or passive exercise, can also be flawed. But even when the identification of the good can be

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Id. (footnotes omitted).

[182] *Id.* at 225.

[183] *Id.*

[184] 530 U.S. 914 (2000).

[185] AQUINAS, *supra* note 12.

[186] Pellegrino, *supra* note 179, at 227.

debated by moral individuals who rely on an objective rather than subjective determination of the good, there may still be disagreement about whether the underlying good has been correctly identified or not. It may be, then, that some proper measure of prudence is needed before the claim to conscience is made and that the law reserves to itself some flexibility in assessing the legitimacy of the claim and whether a right to conscientious objection exists and should be protected. As Dr. Pellegrino suggests, a portion of the problem of positive law addressing this is the need to recognize and acknowledge the competing claims of the good that can surface in a pluralistic society.[187] But, such disagreement should never be a ground for denying the protection of conscience to those who argue that medical procedures such as abortion are wrong.

Recognizing that there can be a potential problem in justly dealing with claims of conscience, some cases offer clear distinctions about competing claims to the good and the exercise of conscience that follows. For example, the United States Supreme Court declared in 1973 that the physician, in the exercise of his professional judgment, could determine if nascent human life could be taken or sacrificed.[188] Some would applaud this as a legitimate exercise of conscience. However, others would assert that this exercise is flawed because the result mistakenly identified as a good is in fact not a good from the perspective of the baby who is aborted. But what would happen to the second physician who, in the exercise of his or her professional judgment and conscience, concluded "I cannot take this life." Does the "mystery of life" passage of *Casey* supply the solution to this predicament? Or, might there be some search for a solution that goes beyond *Casey*'s endorsement of exaggerated personal liberty?

If *Casey* remains the solution, would the second physician, like Thomas More, be compelled to bend to the mother's demand for terminating her pregnancy? If not, it could be said that society and its law respects the conscience of all, rather than some. If, on the other hand, the doctor who objects is in some manner

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[187] *Id.* at 228.

[188] Roe v. Wade, 410 U.S. 179 (1973).

compelled to participate in the practice to which she objects, i.e., to look for a physician who will perform the abortion and refer the patient to that doctor, this society has begun its metamorphosis toward becoming a totalitarian society. In this case, the admonition attributed to Edmund Burke needs to be taken into account: "The only thing necessary for the triumph of evil is for good men to do nothing."[189]

Some may view my labeling the liberal democratic state, which removes conscience protection from the second doctor, a harsh and unsubstantiated conclusion. But is it when one considers that this type of state may be pursuing a well-crafted plan that dictates which beliefs or convictions and actions on those beliefs and convictions are permitted and which are not? When the modern state begins to insist: that all who compound or sell prescriptions must sell abortifacients; that all who are physicians must be trained to do abortions and perform them; that all clergy and justices of the peace must perform weddings between same-sex couples, has not the state engaged in dictating what all must believe and do with no opportunity for dissent? When reason decrees that people may differ about the propriety of abortions, same-sex unions, and the use of abortifacients, in these circumstances should the state demand that all must comply with its rules on these subjects, knowing that there are those who will offer, even gladly, these services to which others object through the exercise of objective reason and conscience? If the state which calls itself a liberal democracy commands uniformity of opinion and action on these divisive issues of the day, does it remain valid to use the moniker "liberal democracy" to describe it? The answer should be obvious.

But, the problem does not end here as Dr. Pellegrino has pointed out. In the early twenty-first century, we seem to be remote from the attitude of the German camp guard or camp commander who, when asked, "Where was your conscience?," replied that he was simply following orders. We may not be so removed from this circumstance as we might like to think. Dr. Pellegrino has noted that "ethicists" of the present day have be-

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[189] Bartleby.com, EDMUND BURKE, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS, *available at* http://www.bartleby.com/73/560.html.

gun to suggest that physicians "must separate their personal moral beliefs from their professional lives if they wish to practice in a secular society and remain licensed."[190] He points out that "health care" is beginning to merge with "death care," and this fusion can regulate human life from its beginning to end; consequently, physicians may begin to wonder if they raise objections to state mandates, would they only be entitled to a limited license to practice the arts of healing?[191] The question can be taken one step further: would they be given a license at all? And, if they have a license, would it be stripped from them when they refuse out of conscience to engage in these procedures?

But, again, the problem does not stop here. Let us assume that the state is willing to respect the exercise of conscience of this physician but then insists that this physician provide the patient with the identity of those physicians willing to perform the services to which the first physician objects on conscience? The physician's conscience has still been violated, but this time indirectly. It is one thing for the physician to turn over a file to another doctor when the patient authorizes this; it is quite another for the physician to be required to search for this doctor, for then he or she would become an accomplice to the activity that strikes at the very heart of the conscientious objection.[192]

The "liberal democracy" continues on its path, either by itself or after heavy lobbying by special interest groups, of mandating compliance with a uniform regime. The state has no qualm about this if ninety-nine percent of the physicians are willing to comply. Should the state, however, be concerned if the compliance number decreases? What if it were sixty percent, or forty percent, or thirty percent, or one percent? As the "liberal democracy" becomes more totalitarian in its outlook, all will have to comply whether this is necessary or not. In the case of performing abortions or euthanasia, assisting in state-sanctioned suicides, distributing poisons to destroy nascent human life, sanctioning same-sex unions, be they in the name of God or of the state, there can be no diversity or tolerance of op-

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190 Pellegrino, *supra* note 179, at 233.
191 *Id.* at 224.
192 *Id.* at 239.

posing views—there is insistence that all comply whether the need for universal compliance is necessary.

Today's reality demonstrates this. In the context of abortion, euthanasia, assisted suicide, morning-after cocktails, or same-sex unions, there are people willing to comply with the expectations for services to which others object.[193] There is no need to coerce all citizens with state sanction—imprisonment, denial of licenses, or fines—to perform acts to which they object in good conscience, based not on "feeling" but on sound and reasoned views of rightness and wrongness. But the totalitarian state insists universal compliance simply because there can be no different voice, there can be no diversity of opinion on matters that previously one could hold as a matter of conscience.

In the past experience of the twentieth century, one totalitarian state demanded adherence to the view that not all persons were equal on fundamental points of human nature—some were subhuman and could be annihilated. But reasoned opinion said otherwise. To have been a law-abiding citizen in that state, one had to hold and practice the view advanced by the state or suffer dire consequences. In the past, another totalitarian state demanded its citizens to proclaim that there is no God when reason and belief said there was. If a person held and expressed the state's view he or she was a comrade and patriot; but if one did not, that person became a traitor and would likely be subjected to calamity.

The views that are suppressed by the totalitarian state need not be unpopular ones. In fact, they may demonstrate that a society is deeply divided on certain issues, such as abortion, euthanasia, morning after pills, and same-sex unions. The views that are the subject of the suppression may be widely held, even by a majority of the polity. But the state has a plan to change all that. So, what is one to do?

One can respond with violence, but that raises serious concerns and can quickly remove the cloak of legitimacy from the divergent view. One can resist through peaceful civil disobedi-

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[193] *See* Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745 (1994) (discussing the "conscience" of Justice Blackmun who authored the majority opinion in *Roe v. Wade*).

ence, but some may consider the deleterious effect this will have on the desire to be a contributing member to one's family and community. And then there is the approach of Thomas More.

From the observations and conversations of Will Roper, More's his son-in-law who was present at More's trial, we learn that More was simultaneously a principled and pragmatic individual. This combination made for a remarkable person, clever in dealing with and confounding adversaries, but straightforward enough to let the objective person understand why he did what others could not do. Thomas More often spoke of conscience and used the term in his correspondence, written after his arrest and prior to his trial. But during his trial, writing and sending correspondence became difficult. Roper, however, was able to capture the essence of More regarding his understanding of conscience. He noted that at the end of More's trial when the Lord Chancellor pressed the accused with the fact that "all the bishops, universities and best learned of this realm" had agreed to the Act of Succession and that More stood by himself by not joining his voice with theirs, More spoke from conscience.[194] More then responded to the Chancellor's question by answering that with this abundance of endorsements by so many prominent persons concluding that the Act was lawful, what need was there for one final endorsement by Thomas More? As More exclaimed, "Why that thing in my conscience should make any change!"[195] With this statement, More rhetorically asked if the legitimacy of the Act was no longer in doubt, what could his humble opinion offer at this late stage. He made the distinction between all those alive who had subscribed to an oath and those in heaven who might have thought otherwise.[196] If he were to be in the second category rather than the first, what matter would it make? Apparently, it mattered a great deal. Yet, More persisted in his tack, and so the Lord Chief Justice declared, "I must confess that if the act of Parliament be not unlawful, then is not the indictment in my con-

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194 WILLIAM ROPER, A MAN OF SINGULAR VIRTUE 91 (A.L. Rowse ed., 1980) (1626).
195 *Id.*
196 *Id.*

science insufficient."[197] With that, More's condemnation was sealed.

The man who returned More to the tower where he would await his execution had this to say to Roper: "I was ashamed of myself, that, at my departing from your father, I found my heart so feeble, and his so strong, that he was fain to comfort me, which should have rather comforted him."[198] By this time, the condemned More was fortified by a remarkable strain of conscience. In a letter he sent to his daughter Margaret from his tower cell, More explained how his conscience guided him.[199] But being ever prudent, he would take precaution not to deny outright what the act of Parliament required but would avoid taking the oath himself.[200] By taking the oath, he would condemn himself to a much higher authority than the King or Parliament. As he said, "in good faith my conscience so moved me in the matter that though I would not deny to swear to the succession, yet unto the oath . . . I could not swear, without the [jeopardizing] of my soul to perpetual damnation."[201] More demonstrated the essence of his identity as a prudent man whose final act must be guided by a well-formed conscience. On the one hand, he searched for ways of remaining the faithful citizen, but on the other, he knew there was a boundary beyond which he could not pass, for if he did, a far more basic law binding all humanity would be crossed. And for Thomas More, crossing that law would be against his nature and his conscience.

He was quick to point out that by exercising his conscience, he could not demand how others should exercise theirs.[202] Certainly it was his fervent hope to do what he could to publicly remain the good citizen who in all respects would abide by what the earthly sovereign commanded. But when his Rubicon had to be crossed, he had no expectation that others out of necessity

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197 *Id.*

198 *Id.* at 92.

199 *Id.*

200 *Id.*

201 Letter from St. Thomas More to Margarat Roper (Apr. 17, 1534), *in* ST. THOMAS MORE: SELECTED LETTERS 217 (Elizabeth Frances Rogers ed., 1961).

202 *Id.*

must follow him and the path he chose for himself. Conscience was simultaneously a private matter between him and his higher authority, God's law. By fulfilling the transcendent requirement, he neither expected nor demanded that others must follow him in his calling. As he said: "As for other men's consciences, I will be no judge . . . [but if he did subscribe to the oath] ye may reckon sure that it were expressed and extorted by duresse and hard handling [torture]."[203] He was resolved to remain true to the conviction of his conscience, but he would oblige no other, "as for other men's, I will not meddle of."[204] As he declared, "I am no man's judge."[205]

It was the style of More to keep his exercise of conscience an individual, even private, matter by not advocating others to follow his example. But on the other hand, his life was a very public act that had great impact on others. His silence proclaimed where he stood when the law demanded what his conscience would not permit, to profess the oath. Thomas More understood well that he must be prepared to meet his final judge. Conscience, therefore, was not exercised for the convenience of the continuation of his earthly life; it was exercised to determine the righteousness of how he would live this life as he prepared for the eternal one.

The memory of Thomas More remains with us. Society may well be richer, better, and more just because of who he was, a man of well-informed conscience. As I have attempted to show, there still remain challenges in exercising conscience. Will there be new scaffolds to mount and new jail cells to inhabit as a result of the exercise of conscience in today's liberal democracies? If so, may those who choose this path because of their conscience remember this extraordinary and wise predecessor, Thomas More. His guidance may just be what the world needs to avert the totalitarianism that beckons the present age.

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[203] Letter from St. Thomas More to Master Leder (Jan. 16, 1535), *in* ST. THOMAS MORE: SELECTED LETTERS 243 (Elizabeth Frances Rogers ed., 1961).

[204] *Id.* at 244.

[205] *Id.* at 253.

ESSAY

IS THE DORMANT COMMERCE CLAUSE EXPENDABLE? A RESPONSE TO EDWARD ZELINSKY

Brannon P. Denning[*]

INTRODUCTION

A judicial determination that a state or local law discriminates against out-of-state commerce or out-of-state commercial actors virtually decides whether the law stands or falls under the dormant commerce clause doctrine (DCCD). The DCCD's "anti-discrimination principle" holds that discriminatory laws are subject to strict scrutiny;[1] laws that discriminate on their face are subject to, in the Supreme Court's words, a "virtually *per se*" rule of illegitimacy.[2] A discriminatory non-tax regulation will be upheld only if the state can prove a "legitimate" interest (i.e., one that does not embody forbidden interests, like protectionism) and there are no less discriminatory means to facilitate that interest.[3] Discriminatory taxes may be saved by proving that the tax on out-of-state economic interests compensates for a tax that in-state residents (but not out-of-state residents) pay.[4]

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[1] Fulton Corp. v. Faulkner, 516 U.S. 325, 345 (1996).

[2] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 476 (2005).

[3] *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986).

[4] *See, e.g.*, *Fulton Corp.*, 516 U.S. at 331-32; Oregon Waste Sys. v. Dep't Envtl. Quality, 511 U.S. 93 (1994).

I am aware of only one case in which the Supreme Court found that a non-tax regulation satisfied its high threshold;[5] and outside of use taxes, "strict enforcement" of the compensatory tax factors "has disqualified most other attempts to gain 'compensatory' tax status."[6]

By contrast, the DCCD's test for non-discriminatory regulations balances "putative local benefits" against the "burden" imposed on interstate commerce.[7] According to the Court, only if the latter is "clearly excessive" compared to the former, will courts strike down the regulation.[8] Of late, this balancing test has been used to invalidate very few statutes in the Supreme Court and does not have much bite in the lower courts either.[9] In tax cases, too, once a tax is deemed to be non-discriminatory, of the remaining factors the Court uses to test constitutionality—sufficiency of nexus to the taxing state, fair relationship between tax and benefits provided to taxpayer, fair apportionment—only the apportionment factor is a significant check on taxing states.

Given the importance of the anti-discrimination principle to the DCCD, any suggestion that it should be abandoned is, to put

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> To qualify as a compensatory tax, the challenged levy must meet three conditions: (1) the state must . . . identify the intrastate tax burden that it is attempting to compensate for; (2) the tax on interstate commerce must not exceed the tax on intrastate commerce; and (3) the two levies must be sufficiently similar in substance to serve as mutually exclusive "proxies" for each other.

BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 8.06, at 8-18 (1999) (footnotes omitted); *see also* Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986).

[5] *See* Maine v. Taylor, 477 U.S. 131 (1986) (upholding state ban on importation of out-of-state baitfish enacted to prevent introduction of nonnative parasites into native fish populations).

[6] BITTKER, *supra* note 4, § 8.06, at 8-18.

[7] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[8] This is the eponymous "*Pike* balancing" test. *See Pike*, 397 U.S. at 142.

[9] According to Professor Day, the Supreme Court has not invalidated a non-discriminatory state law under *Pike* balancing since 1988. *See* David S. Day, *Revisiting* Pike*: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAMLINE L. REV. 45, 49 (2004). For the relatively few lower court cases in which courts have invalidated state or local laws using *Pike* balancing, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 93-94 n.323 (2005-2006).

it mildly, iconoclastic. Yet, in a recent series of articles, Professor Edward Zelinsky has proposed precisely that, at least in cases challenging state tax laws. Professor Zelinksy first offered his heterodox proposal in a 2002 article;[10] more recently, Professor Zelinsky has used the Sixth Circuit's controversial opinion in *Cuno v. DaimlerChrysler Corp.*[11] as a perfect, real-world example of why such radical doctrinal reform is necessary.[12]

Professor Zelinsky's main reason for abandoning the anti-discrimination principle in tax cases is that the principle is incoherent at its core; its problems "overwhelming"[13] and "insurmountable."[14] The principle is hopelessly indeterminate because the case law treats subsidies, which have economically identical effects to taxes and tax credits, differently. More generally, even among taxes, he argues that it makes no sense to describe one set of taxes as "discriminatory" and another set as "non-discriminatory" when all taxes differentiate between in-state and out-of-state taxpayers—between those subject to the taxing jurisdiction of the state and those that are not.

If Professor Zelinsky is correct, then it seems that the anti-discrimination principle should be discarded in non-tax cases as well. In fact, Professor Zelinsky seems to recognize where the logic of his critique leads: to the discarding of the DCCD altogether. But this radical change does not worry him; he assures

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[10] *See* Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation,* 29 OHIO N.U. L. REV. 29 (2002) [hereinafter Zelinsky, *Restoring Politics*].

[11] 386 F.3d 738 (6th Cir. 2004), *rev'd,* 126 S.Ct. 1854 (2006). In *Cuno*, the court of appeals invalidated an Ohio investment tax credit offered to those choosing to make certain capital investments within the state. *Id.* at 741, 746. According to the court of appeals, the Ohio tax credit coerced those wishing to take advantage of it into investing in-state, as opposed to locating the same machinery elsewhere in the country. *See* Edward A. Zelinsky, Cuno v. DaimlerChrysler*: A Critique*, 34 STATE TAX NOTES 37, 40-41 (Oct. 4, 2004) [hereinafter Zelinsky, Cuno *Critique*].

The United States Supreme Court concluded that the plaintiffs lacked standing to bring the case in federal court without reaching the merits. *Cuno*, 126 S. Ct. at 1868. However, the issue is bound to arise again, and we ought to take seriously Professor Zelinsky's argument that the fault in *Cuno* lay not with the Sixth Circuit judges who heard the case, but rather with the anti-discrimination principle itself.

[12] *See, e.g.*, Zelinsky, Cuno *Critique supra* note 11; *see also* Edward A. Zelinsky, *Ohio Incentives Decision Revisited,* 37 STATE TAX NOTES 850 (Sept. 19, 2005) [hereinafter Zelinsky, *Ohio Incentives Decision*].

[13] Zelinsky, *Restoring Politics*, *supra* note 10.

[14] *Id.* at 30.

us that the DCCD is no longer necessary. Political safeguards exist that render the DCCD obsolete, he argues. If cases like *Cuno* are where the anti-discrimination principle and the DCCD lead courts, he adds, then we are much better off without such doctrines.

In this essay, I take issue with both Professor Zelinsky's core argument—that the anti-discrimination principle is incoherent—and his assurances that political safeguards could substitute for judicial enforcement of the DCCD. Part I outlines Professor Zelinsky's main argument against the anti-discrimination principle. In Part II, I explain why Professor Zelinsky's critique and his solution is not a modest one, but rather, taken seriously, means the end of the DCCD itself. In Part III, I defend the anti-discrimination principle against charges of inconsistency and incoherence and argue that political safeguards are insufficient to warrant discarding the principle or the DCCD. A brief conclusion follows.

I. THE CORE OF PROFESSOR ZELINSKY'S CASE FOR ABANDONMENT

According to Professor Zelinsky, the anti-discrimination principle is incoherent and indeterminate because "[w]e can neither distinguish discriminatory from nondiscriminatory taxes nor can we convincingly limit the nondiscrimination principle to taxes."[15] For example, while the DCCD prohibits taxes, exemptions, or tax credits that advantage in-state over out-of-state taxpayers,[16] states are free to subsidize in-state activities free from DCCD scrutiny either directly or indirectly under the DCCD's "market-participant" exception.[17] As Professor Zelinsky

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[15] *Id.* at 79.

[16] *See, e.g.*, S. Cent. Bell v. Alabama, 526 U.S. 160 (1999) (invalidating discriminatory corporate taxes); New Energy Co. v. Limbach, 486 U.S. 269 (1988) (tax credits); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (tax exemption).

[17] *See, e.g.*, Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 591 (1997) (noting that direct subsidies do not ordinarily run afoul of the DCCD); W. Lynn Creamery v. Healy, 512 U.S. 186, 199 (1994) (same). The "market-participant" exception permits states acting as "market participants" as opposed to "regulators"—essentially when the state is engaged in ordinary buying or selling with taxpayer money—to make geographic distinctions the DCCD would otherwise prohibit. *See generally* S.-Cent. Timber Dev. v. Wunnicke, 467 U.S. 82 (1984); Reeves, Inc. v. Stake, 447

points out, however, "[i]n design and in effect, tax credits may be identical to direct outlay subsidies."[18] Further, "if one bestows protectionist advantage on local industry, the other does as well."[19] The Court is inconsistent, he argues, because it does not apply the anti-discrimination principle to economically identical conduct.

Even if one could distinguish between taxes and subsidies, Professor Zelinsky argues that there is another problem: the distinction we make between "discriminatory" and "non-discriminatory" taxes is an illusory one.[20] If enforced to its conceptual limits, the anti-discrimination principle would apply to a range of activities that many think are perfectly acceptable, requiring federal courts to exercise an inordinate amount of influence over the taxing and spending decisions of state and local governments. For example, consider a general reduction in a state's franchise tax. Such a reduction benefits only those taxpayers subject to the jurisdiction of the taxing state, while not conferring benefits on those not so subject. "This tax reduction discriminates," he writes, since the tax-reducing state "grants financial relief only to firms within its borders and thereby creates a corresponding disadvantage for out-of-state competitors who do not benefit from such tax relief."[21] Therefore, he concludes, it makes no sense—setting aside the anomalous treatment of taxes and subsidies—to label one set of taxes "discriminatory" and another set "non-discriminatory" since "[s]tates' tax policies will invariably be confined in effect to those present within the states' respective borders and will thus distinguish between persons in and out-of-state."[22]

U.S. 429 (1980); Dan T. Coenen, *Untangling the Market Participant Exception to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989-1990); *see also* David S. Bogen, *The Market-Participant Doctrine and the Clear Statement Rule*, SEATTLE U. L. REV. 543 (2005-2006); Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. (forthcoming 2008).

[18] Zelinsky, *Restoring Politics, supra* note 10, at 34; *see also* Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 389 (1998) [hereinafter Zelinsky, *Tax "Benefits"*].

[19] Zelinsky, *Restoring Politics, supra* note 10, at 34.

[20] Zelinsky, Cuno *Critique*, *supra* note 11, at 37.

[21] Zelinsky, *Restoring Politics*, *supra* note 10, at 36.

[22] *Id.* (footnote omitted).

Attempts to refine the anti-discrimination principle by reference to adjectives like "coercive"[23] or to concepts like "distortion"[24] he argues, neither improve upon the imprecision of the terms "discriminatory" and "anti-discriminatory" nor operate to prevent the unwarranted expansion of the anti-discrimination principle. Infrastructure, public education, even the provision of day-care services and child care tax credits "had the capacity to distort business decisions by lowering after-tax costs, thereby encouraging a corporation to stay in [a state], to expand, or to commence operations there rather than invest out of state."[25]

Professor Zelinsky is similarly skeptical of Walter Hellerstein and Dan Coenen's[26] attempt to limit the anti-discrimination principle by inquiring whether the tax liability of the payer was preexisting at the time the credit is offered.[27] Only when the taxpayer is offered the "choice" between reducing a preexisting tax liability by in-state investment and not having it reduced if the activity is conducted out-of-state, would Professors Hellerstein and Coenen invalidate the credit.[28] Professor Zelinksy responds that "[a]rguably, for a taxpayer, a tax credit . . . is more valuable when the taxpayer has a second source of in-state income to absorb the credit. . . . If the new facility is unexpectedly unprofitable, the credit may expire without there ever being . . . tax liability for the credit to abate."[29] On the other hand, even if the new investment fails to turn a profit, "the old, preexisting facility might still generate income to use the credit."[30]

In either event, "it is hard to see coercion when a corporation . . . has a second chance, because of a preexisting facility, to

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[23] *Cuno v. DaimlerChryler Corp.*, 386 F.3d 738, 743 (6th Cir. 2004), *rev'd*, 126 S. Ct. 1854 (2006); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 794 (1996).

[24] *See generally* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 453-58 (1996) (arguing that the DCCD should be enforced so as to invalidate economic policies of states that "distort" policies of other states).

[25] Zelinsky, Cuno *Critique*, *supra* note 11, at 39-40.

[26] *Cuno*, 386 F.3d at 746 n.1 (citing Hellerstein & Coenen, *supra* note 23).

[27] Hellerstein & Coenen, *supra* note 23, at 806-07.

[28] *Id.*

[29] Zelinsky, Cuno *Critique*, *supra* note 11, at 40.

[30] *Id.*

absorb a state investment tax credit" or "why the federal judiciary . . . should police these tax credits."[31] Moreover, a coercion-based definition of discrimination is as potentially unlimited as defining discrimination as that which "distorts" economic decision making. A general reduction of state tax rates, he notes, would encourage an out-of-state corporation "both to continue its prior in-state operations and to invest in a new in-state plant. If the tax credit is . . . deemed coercive, discriminatory and unconstitutional, so too must a general rate reduction . . . that makes it more attractive for a firm currently in [a state] to stay and expand there."[32]

Professor Zelinsky's claims, if true, constitute a powerful challenge to the anti-discrimination principle. Further, as I demonstrate in the next Part, and contrary to Professor Zelinsky's protestations,[33] the implications of abandoning the anti-discrimination principle would be quite radical for the DCCD. Fortunately, as I will argue below,[34] the anti-discrimination principle can be defended against the charges levied against it by Professor Zelinsky.

II. THE FALSE MODESTY OF PROFESSOR ZELINSKY'S PROPOSAL

Professor Zelinsky characterizes his proposal as "modest, a doctrinal fine tuning similar to those the Court has made in the past."[35] Specifically, he contrasts his proposal with calls by members of the Court to abandon the DCCD altogether.[36] The

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[31] *Id.*

[32] *Id.*

[33] *See infra* Part II.

[34] *See infra* Part III.

[35] Zelinsky, *Restoring Politics*, *supra* note 10, at 32.

[36] *Id.* at 32 ("Indeed, the proposal to scrap the nondiscrimination principle in the tax setting is far less sweeping than the suggestion, advanced by several current members of the Court, to abandon the dormant Commerce Clause altogether.") (footnote omitted); *see also id.* at 46 ("[T]he Thomas-Scalia proposal to jettison the dormant Commerce Clause *in toto* underscores the relative modesty of my proposal to abandon the nondiscrimination principle for taxation."); *id.* at 84 (describing "incremental reform . . . as more appropriate than radical surgery" given "the centrality of the dormant Commerce Clause to our constitutional tradition as it stands today"). For those proposals, see, for example, *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 610-11 (1997) (Thomas, J., dissenting) (arguing that the Import-Export Clause should do some of the work currently done by the DCCD); Tyler Pipe Indus. v. Wash. State Dep't of Revenue,

critiques of Justice Scalia and Thomas, he writes, are "broader indictment[s] than mine, as these dissenters focused their firepower on the totality of the Court's dormant Commerce Clause jurisprudence, not just the tax-based nondiscrimination principle develop[ment] as part of that jurisprudence."[37] Specifically, he argues that his "proposal would retain for dormant Commerce Clause purposes the notion of nondiscrimination outside the tax context."[38] In addition, he points out, his proposal "would retain the three other elements of the *Complete Auto* formula (nexus, fair apportionment, reasonable relation to services) on the ground that the case law explicating these elements does not display the doctrinal incoherence of the nondiscrimination norm."[39] Professor Zelinsky also notes that other constitutional provisions, like the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, would also be available.[40] But his claims for the modesty of his fix do not withstand closer examination.

First, the logic of Professor Zelinsky's abandonment proposal leads to its application to both taxes and non-tax regulations. Professor Zelinsky's critique of the anti-discrimination principle holds that it makes no sense to differentiate between tax expenditures on the one hand, and subsidies on the other, because the economic effects of both are identical.[41] This would seem to be valid for both taxes and non-tax regulations. A regu-

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483 U.S. 232, 262, 264 (1987) (Scalia, J., concurring in part and dissenting in part) (criticizing the DCCD, urging its abandonment). In fact, Justice Thomas has announced that since the DCCD is beyond salvation, he simply won't enforce it anymore. Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part).

[37] Zelinsky, *Restoring Politics*, *supra* note 10, at 46.

[38] *Id.*

[39] *Id.*; *see also id.* at 32 (noting that the Court "would continue to apply to state taxes the three remaining *Complete Auto* factors: nexus, fair apportionment, and a reasonable relationship to services provided by the taxing state") (footnote omitted); *id.* at 83 ("Abandoning the nondiscrimination principle as a doctrinally unworkable relic would reduce the Court's review of state taxes under the dormant Commerce Clause, but would not terminate that review. The three remaining *Complete Auto* factors—nexus, fair apportionment, and reasonable relationship to government services provided—would continue as judicially-imposed limitations on states' ability to tax interstate commerce" thereby enabling courts to continue to "check the most egregious overreaching by state tax systems") (footnote omitted).

[40] *Id.*

[41] *See supra* notes 15-22 and accompanying text.

lation that subjects out-of-state commerce to a regulatory burden carrying compliance costs of $\$X$ is indistinguishable from a tax on out-of-state commerce for the same amount.[42] It seems to follow, then, that discarding the anti-discrimination principle for tax cases leads inevitably, if one is aiming for consistency, to its abandonment in non-tax cases as well.[43]

Professor Zelinsky's favorable contrast of his own "modest" proposal with the more radical proposals to abandon the DCCD altogether is also misleading. Yes, Justices Scalia and Thomas have separately criticized the DCCD vehemently.[44] Justice Thomas has even apparently washed his hands of the doctrine, indicating he will not apply it in future cases.[45] While not going quite that far, Justice Scalia has indicated that he will only apply the doctrine in cases whose facts involve *facial discrimination* or whose facts are nearly identical to those facts in cases where the Court has previously struck down a state or local law.[46]

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[42] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 12.7 (5th ed. 1998); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971). *Cf.* W. Lynn Creamery v. Healy, 512 U.S. 186, 193 (1994):

> The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State. A tariff is an attractive measure because it simultaneously raises revenue and benefits local producers by burdening their out-of-state competitors. Nevertheless, it violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States.
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> . . . [T]ariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means.

[43] Professor Zelinsky concedes that he's not particularly worried were that to happen. *See* Zelinsky, *Restoring Politics, supra* note 10, at 78, 81-82.

[44] *See supra* note 37 and accompanying text.

[45] *See supra* note 36 and accompanying text.

[46] *See, e.g.*, Pharm. Research & Mfrs. of America v. Walsh, 538 U.S. 644, 674-75 (2005) (Scalia, J., concurring) ("the negative Commerce Clause, having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated"); *W. Lynn Creamery*, 512 U.S. at 210 (Scalia, J., concurring) ("I will, on *stare decisis* grounds, enforce a self-executing 'negative' Commerce Clause in two situations: (1) against a state law that

However, neither Justice is willing to abandon the *anti-discrimination principle*, though each has his own preferred textual hook for it. For Justice Scalia, it is the Privileges and Immunities of Article IV.[47] For Justice Thomas, it is the Import-Export Clause of Article I, Section 10. Moreover, according to Justice Thomas's reading of that Clause, it prohibits *only* discriminatory taxes and only those taxes that resemble "imposts" and "duties" on interstate commerce.[48] I have elsewhere indicated the problems that inhere in such substitutions;[49] but for present purposes, it bears emphasizing that although Scalia and Thomas are for discarding *doctrine*, they insist on retaining the anti-discrimination principle.[50]

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facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.").

[47] *See* Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 264 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that "rank discrimination against citizens of other states" is prohibited not by the Commerce Clause, but by the Privileges and Immunities Clause of Article IV, Section 2).

[48] Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). *See generally* Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155 (1999).

[49] Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003); Denning, *supra* note 48.

[50] I also remain unconvinced that abusive state taxes can be addressed either by the remaining *Complete Auto* doctrine or by other constitutional doctrines. With other doctrines—the Equal Protection Clause or the Privileges and Immunities Clause of Article IV, Section 2—one still has to define and apply the concept of "discrimination." If, as Professor Zelinsky argues, it makes no sense to differentiate among taxes by labeling one set "discriminatory" and the other set "nondiscriminatory" under the DCCD, it is not clear how switching doctrinal contexts resolves that difficulty. Application of the anti-discrimination principle in either of these two contexts may be easier because the discrimination is more likely to be present on the face of the statute. Note, however, that a recent Privileges and Immunities Clause case might have left open the possibility of discriminatory effects challenges under the Privileges and Immunities Clause of Article IV, Section 2. *See* Denning, *supra* note 49, at 390 n.22 (discussing whether *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003), suggests that discrimination-in-effect claims are possible under the Privileges and Immunities Clause of Article IV, Section 2).

As for Professor Zelinsky's claim that *Complete Auto*'s other three requirements would suffice to enable courts to "address particularly notorious cases," Zelinsky, *Restoring Politics*, *supra* note 10, at 78, he does not present examples of cases in which taxes invalidated under the anti-discrimination principle could in fact have been snagged on one of *Complete Auto*'s remaining prongs, which are themselves hardly uncontroversial and have little appeal to ardent DCCD critics like Justice Scalia. *See, e.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 201 (1995) (Scalia, J., concurring) (looking forward "to the day when *Complete Auto* will take its rightful place

III. DEFENDING THE ANTI-DISCRIMINATION PRINCIPLE (AND THE DCCD)

Justices Scalia and Thomas are correct to seek preservation of the anti-discrimination principle. Text, history, and structure support the doctrinal distinction the Court eventually settled on between discriminatory and non-discriminatory (but burden-

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. . . among the other useless and discarded tools of our negative-Commerce Clause jurisprudence").

Consider the questions that the other *Complete Auto* factors raise: Are courts any better suited to determine whether a tax is "fairly related" to benefits provided by the state to the taxpayer? *See, e.g.*, JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION: CONSTITUTIONAL LIMITATIONS AND CORPORATE INCOME AND FRANCHISE TAXES ¶ 4.17[2][c], at 4-173 to 4-176 (3d ed. 1998) (noting that the Court has rejected arguments that the proper measure is between the amount of tax and the value of the services received, adopting instead a test inquiring whether the measure of the tax is reasonably related to the extent of contact with the taxing state) (discussing Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)). How should a court measure whether apportionment is sufficient to avoid the double taxation problem? The requirement of apportionment has spawned the Court's notoriously confusing "internal" and "external consistency" requirements. *See generally* Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983) (announcing the test); Oklahoma v. Jefferson Lines, Inc., 519 U.S. 175 (1995) (applying the test); *see generally* BITTKER, *supra* note 4, § 8.11; Walter Hellerstein, *Is "Internal Consistency" Dead? Reflections on An Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. (forthcoming 2007); Walter Hellerstein, *Is "Internal Consistency" Foolish? Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988); Walter Hellerstein, Michael J. McIntyre & Richard D. Pomp, *Commerce Clause Restraints on State Taxation After* Jefferson Lines, 51 TAX L. REV. 47 (1995); Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149 (2002); Mark L. Mosley, *The Path Out of the Quagmire: A Better Standard for Assessing State and Local Taxes Under the Negative Commerce Clause*, 58 TAX LAW. 729 (2005) (criticizing the internal consistency test). Commentators have also recently questioned whether the nexus requirement—which measures physical, as opposed to economic, presence in a state—makes sense. *See, e.g.*, Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (holding that a state lacks jurisdiction to collect taxes absent a taxpayer's physical presence in the taxing jurisdiction). *See generally* Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109 (2004).

For some recent critiques of the *Complete Auto* criteria, many of which include calls for its wholesale replacement, see, for example, Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 198; Kathryn L. Moore, *State Taxation of Interstate and Foreign Commerce: The Second Best Solution*, 42 WAYNE L. REV. 1425 (1996); Mosely, *supra*; Ferdinand P. Schoettle, *Big Bucks, Cloudy Thinking: Constitutional Challenges to State Taxes—Illumination from GATT*, 19 VA. TAX REV. 277 (1999); Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 MINN. L. REV. 907 (1991).

some) regulations and taxes. In an earlier article,[51] I argued that framers like James Madison were alarmed at the inability of the Articles of Confederation to rein in attempts by states to make money off their neighbors, protect domestic producers, or both by taxing out-of-state commerce or by taxing incoming commerce bound for states with inferior port facilities.[52] The friction produced by commercial rivalry among the states hindered both economic development and political union. Many observers feared the problem would only worsen as time passed.

At the Philadelphia Convention, the drafters sought to remedy these defects. A core purpose of the Commerce Clause—along with other explicit textual provisions[53]—was to inhibit that sort of commercial predation, which invited, and often resulted in, recrimination and retaliation among neighboring states.[54] The Framers did not necessarily appreciate the economic benefits of a national common market, but they had first-hand experience with the political instability produced by recurring cycles of discrimination and retaliation between and among states. While some Framers may have intended for the assignment of the commerce power to Congress to displace state regulatory power over interstate commerce entirely,[55] the emergence of the anti-discrimination principle was closer in scope to the evil the Commerce Clause and related provisions were intended to remedy, while avoiding the regulatory vacuum that would

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[51] Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005-2006).

[52] *See id.* at 49-59 (describing Framers' fears); *id.* at 59-66 (giving examples of discrimination against interstate commerce by states). Discussing Professor Coenen's proffer of historical reasons for continuing to differentiate between taxes and subsidies, Professor Zelinsky writes that "[i]t is . . . at best arguable that the Framers were more concerned about tax than nontax impediments to interstate trade." Zelinsky, *Restoring Politics*, *supra* note 10, at 59. Among the prominent Framers discussing the issue, I found no mention of non-tax regulatory barriers of the sort that form the basis for many DCCD cases today. To the extent they focused on interstate discrimination, my study of the record suggests that was their primary, if not exclusive, focus.

[53] Denning, *supra* note 51, at 85-89 (discussing the other provisions).

[54] *See id.* at 81-89 (discussing purpose of the Commerce Clause and related restraints on state regulation of interstate commerce).

[55] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (Chief Justice Marshall conceding the persuasiveness of the exclusivity argument); Denning, *supra* note 51, at 81-85 (discussing views regarding exclusivity); Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1422-50 (2004) (same).

have resulted from adopting a rule of exclusivity.[56] If we do away with the anti-discrimination principle, we knock the main prop out from under the whole doctrine. Without anti-discrimination, we might as well abandon the DCCD itself, since it has little reason to exist otherwise—in non-tax cases at least—and little otherwise judicially-enforceable content.

But it is the radical nature of Professor Zelinsky's proposal that makes engagement with it particularly important. If the problems with the anti-discrimination principle are so fundamental and so irremediable, then the question he is really asking is whether we ought not discard the DCCD altogether. Professor Zelinsky seems to recognize this, as both the title ("Restoring Politics to the Commerce Clause") and a substantial part of his article make the case that the DCCD is no longer necessary—that adequate political safeguards exist to insure against state overreaching. He argues that the anti-discrimination principle can be safely discarded because the initial purpose of the DCCD—to ensure the establishment and maintenance of a national common market—has been realized. "The United States," he writes, "is now home to a robust network of interstate economic actors the Founders could not have imagined. These interstate actors . . . no longer need the protection of incoherent Commerce Clause doctrine. They have the incentive and the wherewithal to protect their interests politically."[57] In short, "the nondiscrimination principle is unnecessary as taxpayers aggrieved by state tax policies have political remedies in Washington and in the state capitals."[58]

He cites instances in which taxpayers have sought (and Congress has granted) remedies for mischievous state tax policies,[59] and argues that "[t]he alternative to the nondiscrimination rule and its doctrinal incoherence is not unfettered taxation by the states, but congressional (rather than judicial) determination of the boundaries of that taxation."[60] He notes that Con-

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[56] *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

[57] Zelinsky, *Restoring Politics*, *supra* note 10, at 31.

[58] *Id.* at 80.

[59] *Id.* at 84-87.

[60] *Id.* at 86.

gress might resolve these disputes somewhat differently than would courts, and suspects that "in a world without a dormant commerce clause prohibition on discriminatory taxation, states will bargain among themselves over their respective tax policies to a greater extent than they do today."[61] For Professor Zelinsky, though, these are "features" of, not "bugs" in, his proposal. In the end, the political safeguards may not be perfect, but they are preferable to incoherent doctrine; and, in any event, Professor Zelinsky is "confident" that a world without the anti-discrimination principle "will entail neither commercial disaster nor the dismemberment of the Union—just more politics."[62]

Thus, the normative bite of Professor Zelinsky's critique depends on the truth of two propositions. (1) Economic realities render the anti-discrimination principle inconsistent insofar as it treats events with identical economic effects differently, and, further, any distinction between discriminatory and nondiscriminatory taxes is incoherent and cannot be remedied. (2) Political safeguards exist that make the anti-discrimination principle (and the DCCD as a whole) unnecessary and expendable.

I will argue in this Part that neither of these two propositions is true. The distinction between "discriminatory" and "nondiscriminatory" taxes is not a meaningless one, nor does the differential treatment by the Court of taxes and subsidies render the anti-discrimination principle inconsistent or incoherent. Further, existing political safeguards cannot monitor abuses as effectively as the DCCD, and, moreover, I do not think that we have reached a point in our national development at which the DCCD is no longer necessary. While the anti-discrimination principle is in need of some refinement, the inconsistency and incoherence that Professor Zelinsky condemns as fatal are, I argue, defensible, or at least can be remedied. Discarding the

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[61] *Id.* at 87.

[62] *Id*; *see also id.* at 78 ("I doubt that, if state regulations now stricken on Commerce Clause grounds instead survive, the Union will come flying apart."); *id.* at 81 ("[T]here is today a Chicken Little quality to rhetoric which suggests that Hawaii's sales tax exemption for okolehao is the first step towards commercial disunion, particularly when an equivalent direct subsidy is viewed benignly in constitutional terms.").

DCCD because of difficulties in implementation burns down the proverbial house to roast the pig.

A. Framing Effects, the DCCD, and the Tax-Subsidy Distinction

Professor Zelinsky concedes that the "core concept" defense[63] outlined above[64] "is the strongest of the possible justifications for the doctrinal status quo," but still finds it wanting because of the "fundamental incoherence of [the] principle."[65] The anti-discrimination principle is invoked when tax incentives are used and those incentives are struck down; but the principle is not invoked when subsidies, which he argues are identical in effect, are used. While conceding the inherent uncertainty at the margins of legal doctrine, he concludes:

> [E]ven under very forgiving standards, it is anomalous to declare free trade the controlling value when legislatures pick tax expenditures from the available tool kit, but to privilege federalism concerns when legislatures enact direct outlays, equivalent in effect and often design to such tax expenditures. . . . [A]d hoc, inconsistent applications of core values can erode, rather than reinforce, those values.[66]

There are several responses to this observation. First, it is possible that Professor Zelinsky has identified the wrong value that the DCCD seeks to protect. If I am correct,[67] then the aim of the Framers (and the DCCD) is not free trade for its sake, but the arresting of commercial friction that can produce cycles of discrimination and retaliation. Free trade becomes a *consequence* of the DCCD, but was not necessarily its aim. Thus, the anti-discrimination principle and federalism are not values that

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[63] Professor Zelinsky credits Professors Coenen and Hellerstein with a similar argument apparently made in comments to a draft of his paper. *See* Zelinsky, *Restoring Politics*, *supra* note 10, at 76 n.208.

[64] *See supra* notes 8-14 and accompanying text.

[65] Zelinsky, *Restoring Politics*, *supra* note 10, at 76.

[66] *Id.* at 77.

[67] *See supra* notes 54-57 and accompanying text. *See also* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (making a similar argument).

are in tension. Rather, the former represents a check on a particular result of federalism that the Framers sought to eliminate. When the tax or regulation does not present the ill the anti-discrimination principle sought to remedy, then there is no need to police it under the DCCD.

Second, and related to the first point, there is evidence, compiled by Professor Zelinsky himself,[68] that while the economic effects of expenditures and outlays may be identical, the choice of one or the other generates powerful framing effects producing differences in perception. Professor Zelinsky asked groups of law students to suppose that volunteer firefighters were offered the choice between (a) $500, $2,000, or $5,000 in cash or (b) a property tax credit for the same amount.[69] Then he asked which would endanger the volunteer status of the firefighters. Despite the identical economic effect of both forms of compensation, students overwhelmingly said that accepting the cash would be a problem, but that the tax abatement would not.[70]

The results of Professor Zelinsky's experiment support Dan Coenen's earlier conclusion that subsidies are just seen (both as a matter of history and in accord with current practice) as different.[71] As Professor Zelinsky himself puts it, "Labels mat-

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[68] Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797 (2005).

[69] *Id.* at 815-21, 827-34.

[70] *Id.* at 821 ("The survey results suggest that a critical segment of the voting public—those subject to the framing effect phenomenon—views tax relief, but not similar cash payments, as consistent with firefighters' volunteer status. Insofar as these voters also value volunteer firefighting departments, they will support tax relief as compatible with volunteer standing but will oppose economically and procedurally identical cash payments as converting firefighters into paid professionals. Labels matter.").

[71] Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 1002 (1998) (arguing that "the long-recognized distinction between subsidies and tax breaks reflects far more than 'magic words and labels.' It reflects instead, as many cases suggest it should, 'economic realities' and 'practical effect.'") (footnotes omitted).

> [T]he traditional distinction between monetary subsidies and discriminatory tax breaks can lay claim to roots that sink deeply into Commerce Clause case law. . . . [F]our separate justifications support the traditional subsidy-protective rule. First, considerations of constitutional history provide a firm "formal" basis for distinguishing cash grants from discriminatory taxation. Second, a broad state power to subsidize rests on the fairness-based notion

ter."[72] In his initial response to Professor Coenen, Professor Zelinsky dismissed the relevance of this perception. Though it was "empirically true," he doubted whether "this kind of psychological effect should control for Commerce Clause purposes," even as he conceded that, "in some situations, legal doctrine should accommodate psychological realities of this sort."[73] He offers the example of the rule of realization: taxpayers are taxed only on appreciation that is realized following the sale of an asset.[74] Despite identical economic effects of asset appreciation,

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> that state residents should be able to reap where they have sown. Third, the traditional distinction vindicates values of federalism, by granting heightened authority to state governments to direct to the benefit of the state's citizenry those tangible assets that the state itself owns. Finally, for many reasons—focusing on visibility, intelligibility, self-limitation, and impermanence—subsidies pose less of a threat to dormant Commerce Clause values than do discriminatory tax breaks.

Id. (footnotes omitted).

Professor Zelinsky finds all such arguments wanting. Taking aim at Professor Coenen's policy arguments, Professor Zelinsky denies that there is anything more transparent or self-limiting about subsidies as opposed to taxes. Zelinsky, *Restoring Politics, supra* note 10, at 57; *see also id.* at 50-52. Moreover, he argues, were the political process controls to exist, they would be beside the point in a DCCD analysis because "as a matter of economic effect, direct expenditure subsidies for local industries hamper free trade outcomes as much as tax incentives advantaging in-state producers over their out-of-state competitors." *Id.* at 57. Professor Zelinsky further argues that Coenen's appeals to history are misplaced, *id.* at 58-59, calling reliance on history "misplaced" and arguing that not only is the record meager, but also that "[i]t is . . . at best arguable that the Framers were more concerned about tax than nontax impediments to free trade." *Id.* at 59. He further argues that Coenen's analogies to the First Amendment's distinction between direct funding and subsidization, *see* Coenen, *supra*, at 980, are inapt because the doctrinal setting in which that distinction is made is different than in the DCCD. Zelinsky, *Restoring Politics, supra* note 10, at 61 (arguing that "there is no parallel to Free Exercise in the Commerce Clause context: no one suggests that commercial institutions and actors have a Commerce Clause right to autonomy. It is therefore unpersuasive to import into the Commerce Clause the tax/spending distinction used to accommodate the autonomy of religious organizations and persons under the rubric of Free Exercise when there is no equivalent constitutional recognition of the autonomy of commercial actors"). For more on taxes and benefits in the Free Exercise area, see Zelinksy, *Tax "Benefits," supra* note 18. Professor Zelinsky is convinced that states neither incur lower administrative costs administering subsidies, Zelinsky, *Restoring Politics, supra* note 10, at 62, nor that any differences that people perceive between taxes and subsidies should be relevant given the identity of economic effects. *Id.* at 62-63.

[72] Zelinsky, *supra* note 68, at 821.

[73] Zelinsky, *Restoring Politics, supra* note 10, at 62-63.

[74] *Id.* ("As an economic matter, an individual who sells a share of stock at a $50 profit has had the same accession to his wealth as an individual still holding the same share of stock with an unrealized gain of fifty dollars. In both cases, the taxpayer's net worth has increased by the same fifty dollars.").

"rank-and-file taxpayers believe that it is unfair to tax individuals with unrealized gains . . . . Acceptance of this psychological phenomenon is an important reason that the federal income tax is realization-based and defers taxation until a sale or exchange . . . ."[75]

Professor Zelinsky, though, argues that any attempt to analogize between the tax code and the DCCD is inapt. Unlike the tax code, which is aimed at millions of taxpayers—on whom the government depends for compliance[76]—the DCCD "is a doctrine restricting the actions of legislators, governors and the administrators who work for them" and does not depend on their compliance for its efficacy.[77] It is reasonable, he argues, "to place greater demands" on these elites than on taxpayers.[78] He then repeats a variation of his earlier argument noting the inconsistency in valuing "free trade" when taxes were at issue, but subordinating that value to "federalism" when subsidies were challenged. "If the free trade policy of the dormant Commerce Clause is critical to national well-being," he writes, "it is anomalous to sacrifice that well-being for the psychologically real, but economically fallacious, belief that subsidization via direct outlays differs from tax-based subsidization."[79]

But Professor Zelinsky presents no evidence that "elite" politicians aren't as susceptible to framing effects as other "ordinary taxpayers."[80] Further, he doesn't explain why it is "reasonable" to put greater demands on them when enacting legislation or why it is inappropriate for judges to incorporate framing effects into the DCCD.[81] Other constitutional doctrines seem to incorporate the results of framing effects. For example, courts

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[75] *Id.*

[76] *Id.* ("Accommodating the psychological realities of rank-and-file taxpayers is sensible when literally millions of such taxpayers must comply with the tax law. It facilitates compliance if the average taxpayer perceives the law as fair, even if those perceptions are economically naive.").

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See supra* notes 70-71, 73.

[81] *See supra* note 73.

distinguish between positive and negative rights;[82] permit legislators to refuse to subsidize a right, even when that action is tantamount to limiting that right for the poor;[83] and distinguish between federal preemption, which requires states only to comply with a law, and commandeering, in which the federal government requires affirmative action by states.[84] Thus merely stating that X is the functional equivalent of Y and thus both ought to be held to violate constitutional guarantee G does not go far enough. One must also assert that the reasons for G are implicated by X, as they are by Y. As he did earlier, Professor Zelinsky makes that argument. Here, G is "free trade"; but Professor Zelinsky's critique holds only if one accepts that free trade simpliciter is the driving force behind the DCCD.[85] If, on the other hand, the purpose of centralizing trade was the elimination of obstacles to trade likely to promote or exacerbate friction among states,[86] then the perceptions among state actors seem particularly relevant. To the extent that certain governmental actions (subsidies, for example) are not perceived by others as imposing a burden on out-of-state commerce or out-of-state commercial actors, it is less likely that those actions will stimulate retaliatory responses aimed at the enacting state, its products, or its citizens.

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[82] *See generally* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (describing and critiquing the distinction between positive and negative liberties).

[83] *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment prohibiting use of federal funds for performing most abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding state law denying use of Medicaid funds for nontherapeutic first-trimester abortions). For criticisms that the Court, in effect, penalized the exercise of what, in *Roe*, it had held to be a constitutional right, see Michael J. Perry, *Why the Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McCrae, 32 STAN. L. REV. 1113 (1980); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1498-99 (1989).

[84] *Compare* Reno v. Condon, 528 U.S. 141 (2000), *with* Printz v. United States, 521 U.S. 898 (1997). For an argument that if commandeering is unconstitutional, affirmative preemption ought to be reexamined, since it could be said to commandeer "negatively," see MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 83-90 (2003). *See also* Erwin Chemerinsky, *Right Result, Wrong Reasons*: Reno v. Condon, 25 OKLA. CITY U. L. REV. 823 (2000) (arguing that commandeering and preemption are related and that the distinction between the commandeering cases and *Reno v. Condon* were unpersuasive).

[85] *See supra* notes 54-59 and accompanying text.

[86] *Id.*

B. "Discrimination" is Not an Incoherent Concept

In addition to criticizing the DCCD's distinction between cash subsidies and tax credits, Professor Zelinsky questions the entire distinction between discriminatory and nondiscriminatory taxes. A general reduction in franchise taxes by State A, he argues, "discriminates" against out-of-state companies that don't pay taxes in State A. State A's corporate taxpayers receive a benefit that is denied to out-of-state taxpayers. Because no one would dream of empowering courts to use the DCCD to strike down a state's general reduction in its corporate tax rate, Professor Zelinsky concludes, there is something incoherent about any distinction that, taken to its logical conclusion, leads to this result.

I wonder, however, about his use of the term "discrimination" to describe the effects on the non-taxpaying, out-of-state company in his example. Black's Law Dictionary gives the following definition for "discrimination": "differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[87] Legal doctrine policing discrimination tracks that definition—one must show that one is similarly situated to another, and denied equal treatment based on criteria that are unreasonable or legally proscribed. The denial of equal treatment may involve having burdens visited upon you that other similarly-situated parties do not suffer, or being barred from enjoying certain benefits available to otherwise similarly-situated parties. In other words, there is some harm suffered by the party discriminated against, and the harm results from a distinction made by government based on legally proscribed criteria.

Turning back to Professor Zelinsky's example, it is difficult to see how that situation involves "discrimination" under the DCCD since the out-of-state corporation is not even subject to the taxing jurisdiction of State A. In what way, then, can the out-of-state corporation be said to suffer harm at all by a general reduction in State A's corporate tax rate? It certainly isn't

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[87] BLACK'S LAW DICTIONARY 500 (8th ed., 2004).

required to pay *higher* taxes to State A than its in-state counterparts—it doesn't pay taxes to State A at all. Moreover, it would not be natural to describe the "harm" to the out-of-state corporation as the failure to enjoy the benefits of State A's lower taxes. Again, presumably if the out-of-state corporation undertook operations in State A, thus becoming subject to State A's taxing jurisdiction, then it, too, would enjoy the benefits of the general rate reduction with other taxpayers. Unless Professor Zelinsky is prepared to argue that there is psychic harm resulting from the out-of-state corporation's mere knowledge that there are states with low tax regimes from which it is unable to benefit because it is not subject to those states' taxing jurisdictions, I do not understand how there is discrimination at all in his example, or how his example shows that the entire discrimination/nondiscrimination distinction is useless and hollow.

Perhaps I am not being fair to Professor Zelinsky's argument. His real target seems to be decisions like the Sixth Circuit's in *Cuno* and the arguments employed by plaintiffs' counsel in that case, which he believes lead to his (admittedly) absurd example. But saying that particular *applications* of the anti-discrimination principle are wrongheaded is not the same as proving that the entire concept is hollow or irredeemable.

C. The Insufficiency of Political Safeguards

Professor Zelinsky's willingness to discard the anti-discrimination principle—and, if pressed, the entire DCCD—is bolstered by his faith in two things. First, he argues that the United States has evolved to the point that we no longer need the DCCD to secure political or economic union.[88] Second, to the extent that some protection is needed from rapacious states, political safeguards exist to provide that protection and, in fact, have provided protection in the past.[89] In this section, I question both conclusions.

The assertion that we have evolved as a nation to the extent that the DCCD is no longer necessary is incapable of proof.

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[88] *See supra* notes 58, 59 and accompanying text.

[89] *See supra* notes 58, 59 and accompanying text.

We will never know, moreover, whether, if true, that evolution occurred because of or in spite of the DCCD. It is worth noting, though, that state and local governments regulate in the shadow of the DCCD, and I do not think it unreasonable to assume they (or their lawyers) regard their tax and regulatory options as bounded by the doctrine. In the absence of the DCCD would they still regard their legislative options as bounded to the same degree? My sense is that they would not.[90]

Evidence exists that the protectionist impulse is not necessarily something that countries "outgrow." Even with the DCCD, state and local governments still attempt to enact legislation that protects local businesses, advantaging them relative to their out-of-state competitors.[91] At the national level, anxiety about foreign competition during economically uncertain times,[92] coupled with national security concerns, produced an outcry over a foreign company's proposed acquisition of American port facilities.[93] And recently, one has not been able to pick

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[90] Indeed, when Congress removes the DCCD as a fetter, by exercising its redelegation power, states often respond by enacting the very sorts of parochial legislation the DCCD would otherwise prohibit. *See infra* notes 105-17 and accompanying text.

[91] Wal-Mart is a current popular target. *See generally The behemoth from Bentonville*, ECONOMIST, Feb. 25, 2006, at 85 (reviewing books about Wal-Mart). Numerous local governments have passed ordinances capping the size of retail stores like Wal-Mart. Many are blatant attempts to shield local stores from competition. *See generally* Brannon P. Denning & Rachel M. Lary, *Retail Store Size Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW 907, 909-16 (2005) (describing size-capping ordinances and offering examples). Though it was later struck down by a federal district court, Maryland attempted to require Wal-Mart to pay a certain percentage of its employees' health care costs. Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 186 (4th Cir. 2007). The bill, dubbed "fair share" by its proponents, was supported by a local chain that competed with Wal-Mart in the grocery business, and whose share of employee costs already exceeded the state-mandated minimum. *Id.* *See generally* Edward A. Zelinsky, *Maryland's "Wal-Mart" Act: Policy and Preemption*, 28 CARDOZO L. REV. 847 (2006).

[92] *The isolationist temptation*, ECONOMIST, Feb. 11, 2006, at 27, 28 ("While many Democrats want to curb the inflow of foreign goods, many Republicans want to curb that of foreigners."); *Trouble on the waterfront*, ECONOMIST, Feb. 25, 2006, at 33, ("Xenophobia seems to be creeping into American politics.").

[93] Christopher Conkey, *Foreign Companies Slowed Capital Spending in U.S.*, WALL ST. J., Apr. 21, 2006, at A4 (noting reduction in spending in reaction to perceived rise in protectionist sentiment in Congress); Greg Hitt, *Lawmakers Keep Up Pressure on Dubai Ports Firm*, WALL ST. J., March 16, 2006, at A2; Neil King, Jr., *When Security, Foreign Investment Collide*, WALL ST. J., April 10, 2006, at A4 (noting rising sentiment in Congress for closer governmental scrutiny of foreign acquisition of U.S. assets); Neil King, Jr., *Senate Advances Foreign-Investment Legislation*, WALL ST. J., March 31, 2006, at A3

up an issue of the *Economist* without finding similar stories of resurgent protectionism in Europe and Asia. [94]

But Professor Zelinsky has anticipated and responded to my skepticism with reassurances about Congress's ability to police and remedy state abuses. In his article, he offered two examples. First, when California began taxing distribution of retirement income that had been accumulated, tax-free, in California to persons now residing in Nevada, which lacks an in-

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("The Senate moved forward on legislation to increase government oversight of foreign investments in the U.S. . . . .").

[94] John W. Miller, *EU Warns 19 Nations to Stop Blocking Foreign Competition*, WALL ST. J., Apr. 20, 2006 at A7 ("The European Commission took legal steps against 19 European Union governments it says are breaking the bloc's single-market rules."); Kathy Chen, *Amid Tension with U.S., China Faces Protectionist Surge at Home*, WALL ST. J., Mar. 31, 2006, at A1; Adam Cohen, *EU Continues Push to Eliminate Takeover Barriers*, WALL ST. J., Apr. 7, 2006, at A8 (discussing efforts to eliminate "special ownership rights, or 'golden shares,' that allow governments to block foreign takeovers of formerly state-owned companies"); *Coming to market*, ECONOMIST, Apr. 15, 2006, at 69 (discussing protectionism in India); Kemba J. Dunham, *South Africa Debates the Economic Benefits of Real-Estate Investment by Outsiders*, WALL ST. J., Apr. 10, 2006 (noting government officials' worries that "outsiders are pricing locals in the country's housing market" and recommending regulation of foreign ownership of land as remedy); William Echikson, *National Identity Fuels Opposition to Deal*, WALL ST. J., Mar. 18-19, 2006, at A4 (discussing opposition within Luxembourg to Mittal Steel Co.'s bid to take over Arcelor SA and government attempts to block it); *Freedom fried*, ECONOMIST, Feb. 11, 2006, at 11 ("The promotion of the four freedoms [free movement of goods, labor, capital, and services] has increased the prosperity and liberty of ordinary Europeans. But now there is a backlash. More and more politicians are complaining that the EU is pursuing policies that cause economic insecurity. As a result, all four freedoms are now directly threatened."); Holman W. Jenkins, Jr., *Le Gazprom?*, WALL ST. J., Mar. 15, 2006, at A23 (criticizing French efforts to head off a proposed merger between Enel, an Italian company, and Suez, a French water and power company); Scott Miller & Juliane von Reppert-Bismarck, *EU Seeks to Toughen Reviews of Genetically Modified Foods*, WALL ST. J., Apr. 13, 2006, at A10 (noting fight over EU refusal to approve genetically-modified foods and crops and allegations that refusal violates trade laws); *The politics of power-European energy markets*, ECONOMIST, Feb. 11, 2006, at 65-67 (describing the backlash against liberalization of utilities in Europe); Daniel Schwammenthal, *Common Market? Think Again!*, WALL ST. J., Mar. 13, 2006, at A19 ("From France to Spain, from Luxembourg to Italy and even newcomer Poland, economic nationalism is gaining strength, evoking memories that the European project was created expressly to bury."); *Toxic tipple, but all our own*, ECONOMIST, Apr. 15, 2006, at 53 (discussing Russian ban on Georgian and Moldovan wines and spirits; noting suspicions that ban was motivated by protectionism and that "[t]rade bans, like gas-price rises, are now a feature of Russian policy towards its least-favourite neighbours"); *When east meets west*, ECONOMIST, Feb. 11, 2006, at 47 (discussing restrictions on free movement of labor among western European countries); *The white peril*, ECONOMIST, Apr. 1, 2006, at 34 (discussing misgivings among Chinese about the level of foreign investment in the country).

come tax, the former Californians became upset.[95] The result was P.L. 104-95, "which prevents states from taxing retirement income, unless the recipient of that income resides in the taxing state."[96] His second example is 2001's three-year extension of the federal moratorium on state and local taxation of electronic commerce.[97] The wisdom of either measure is beside the point for Professor Zelinsky. He writes of the moratorium extension:

> My point is that the Act emerged from the congressional forum in which tax controversies of this sort can be addressed, a forum which will be used more frequently if the Court removes itself from the problematic business of determining which state taxes are discriminatory and thus proscribed by the dormant Commerce Clause.[98]

Were the anti-discrimination principle to be abandoned, Professor Zelinsky predicts that more similar legislation would be forthcoming.[99]

Missing from Professor Zelinsky's benign account of congressional action are examples in which congressional action has authorized the very sort of discrimination centralized control over interstate commerce was supposed to eliminate. There are at least as many instances of Congress acting to countenance state abuses as there are examples of remedial action to quell them.

Congressional power to reverse court decisions under the DCCD through the exercise of its affirmative commerce power[100] has long been regarded as a useful check on the judicial en-

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[95] Zelinsky, *Restoring Politics*, *supra* note 10, at 85.

[96] *Id.*

[97] *Id.* at 86.

[98] *Id.*

[99] *Id.* at 85-86 (discussing congressional legislation to stop Oregon from taxing Washington State tugboat operators plying their trade on the Columbia River, which marks the boundary between Washington and Oregon).

[100] *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (upholding the McCarran-Ferguson Act, which removed the DCCD's strictures from state regulation of the business of insurance); BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 9.01-9.05 (1999 & 2006 Supp.); Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 Minn. L. Rev. 1764, 1784-95 (2004) (offering examples); Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 176-93 (2005) (giving examples).

forcement of that doctrine.[101] In the first cases in which the Court approved congressional exercise of its "redelegation" power, Congress reversed a judicial determination that a particular bridge obstructed a navigable waterway and had to be dismantled,[102] and passed laws permitting states to enforce prohibition statutes against interstate shipments of alcohol.[103]

The Court's next case involving this redelegation power concerned the passage of the McCarran-Ferguson Act; it is interesting to note state reaction to this piece of legislation. Until the 1940s, the Court's position was that the business of insurance was not "interstate commerce" and was, therefore, not subject to the DCCD.[104] In *United States v. South-Eastern Underwriters Association*, however, a plurality of the Court repudiated this position, holding that the Sherman Anti-trust Act could be applied to insurance companies.[105] This, of course, would mean that the web of state insurance regulations would now be subject to scrutiny under the DCCD. In response, Congress enacted the McCarran-Ferguson Act, which stated that "silence" on the part of Congress regarding the regulation of insurance "shall not be construed to imposed any barrier to the regulation or taxation of such business by the several States,"[106] language clearly intended to disable the DCCD.[107]

In response, South Carolina enacted a discriminatory tax that required out-of-state insurance companies—but not local insurance companies—to pay 3% of their premiums collected

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[101] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957).

[102] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

[103] *See, e.g., In re* Rahrer, 140 U.S. 545 (1891) (upholding the Wilson Act); *see also* Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311 (1917) (upholding the Webb-Kenyon Act, passed to close loopholes created by judicial interpretation of the Wilson Act).

[104] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868) ("Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of the word. . . . They are . . . local transactions, and are governed by the local law.").

[105] 322 U.S. 533 (1944).

[106] 15 U.S.C. § 1011 (2000).

[107] BITTKER, *supra* note 4, § 3.08[C], at 3-51 ("[T]he statutory message was clear enough: the courts are not to use the dormant Commerce Clause doctrine to nullify state regulation or taxation of the insurance business.").

from in-state customers.[108] The Court held that Congress had implicitly approved such legislation when it passed the McCarran-Ferguson Act. Affirmative action by Congress disabled the implicit bar on discriminatory regulation imposed by the DCCD. The Court's holding inspired other states to emulate South Carolina, and forced the Court to innovate to strike down some of this discriminatory legislation.[109] The McCarran-Ferguson Act is not an anomaly:

• In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,[110] the Court, relying on a federal statute, rejected a DCCD challenge to state statutes regulating the acquisition of in-state banks by out-of-state bank holding companies that would have been invalid without the federal statute.[111]

• The "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005"[112] included the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005,"[113] which is intended to forestall DCCD challenges to state statutes that restrict the ability of non-residents to hunt on equal terms with residents. Obviously modeled after the McCarran-Ferguson Act, this provision instructs that "[s]ilence on the part of Congress shall not be construed to impose any [Commerce Clause] barrier . . . to the regulation of hunting or fishing by a State or Indian tribe"[114] with regard to laws that differentiate between residents and non-residents "with respect to the availability of

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[108] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 410-11 (1946).

[109] Years later, when Alabama attempted to do something similar, the Court strained to invalidate its efforts under a tendentious reading of the Equal Protection Clause. In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), a sharply divided Court concluded that Alabama's discrimination against out-of-state insurance companies violated the Equal Protection Clause. Justice Powell, for the Court, held that Alabama had no legitimate state interest in favoring domestic over out-of-state companies. 470 U.S. at 877-79. *See generally* William Cohen, *Federalism in Equality Clothing: A Comment on* Metropolitan Life Insurance Company v. Ward, 38 STAN. L. REV. 1 (1985).

[110] 472 U.S. 159 (1985).

[111] *Id.* at 174-75.

[112] Pub. L. No. 109-13.

[113] *Id.* § 6036.

[114] *Id.* § 6036(b)(2).

licenses or permits for taking of particular species of fish or wildlife" or bag limits or license fees.[115]

• In response to Supreme Court cases invalidating state and local attempts to bar the importation of out-of-state or out-of-county garbage or charge more for the disposal of non-local garbage, legislation has been introduced in Congress that would permit discriminatory treatment of non-local waste.[116]

While these recent enactments certainly represent politics of a sort, I question whether it is the sort of political remedy we ought to welcome. In many cases, instead of policing state abuses, Congress is merely facilitating them. The history of congressional "redelegation" from the McCarran-Ferguson Act on down seems to be the familiar story of a legislative body delivering concentrated benefits to well-organized interest groups. I am not prepared to say that Congress may not override the DCCD as a matter of constitutional law,[117] but neither do I think that congressional action is a sufficient substitute for a judicially-enforced anti-discrimination principle.

Even assuming that more benign exercises of congressional power would be forthcoming, I wonder how much more active we could realistically expect Congress to be. Others have noted the relative scarcity of congressional resort to this "override."[118] Given the difficulty of passing legislation, it would seem that a particular issue would have to implicate an issue of interest to a very broad group of states—like the taxation of Internet commerce, for example—in order to secure a federal statute. I suspect, in Alexander Bickel's words, that the "[g]reat numbers and . . . great variety of state measures . . . involved," each having "a quite narrow impact in itself and . . . unlikely to rouse na-

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[115] *Id.* § 6036(b)(1). For an application of the statute, see *Schutz v. Thorne*, 415 F.3d 1128, 1138 (10th Cir. 2005) (congressional statute barred plaintiff's dormant Commerce Clause challenge to Wyoming statutes charging out-of-state residents higher fees for hunting and limiting the amount of game taken in the state relative to in-state hunters; "[e]nactment of HB 1268 renders Schutz's dormant Commerce Clause claim moot").

[116] *See, e.g.*, H.R. 274, 109th Cong. § 2 (2005), discussed in Williams, *supra* note 100, at 235-37.

[117] For an argument along those lines, see Williams, *supra* note 100.

[118] Chen, *supra* note 100, at 1784 ("[S]pecific instances of congressional waiver in direct response to a dormant Commerce Clause decision are quite rare" coming mainly in decisions involving "either liquor or financial services.").

tional interest" means that such national intervention would remain rare.[119] If that is true, then there will be a large number of abuses for which judicial remedy may be had that will remain untouched. Or Congress will find itself swamped with petitions from aggrieved interstate economic interests, will "codify" the DCCD, and hand the whole matter off to an executive agency.[120] In that case, the agency will have to handle these cases, and will likely fall back on heuristics like the anti-discrimination principle to distinguish cases.

Alternatively, as mentioned above, legislation offering concentrated benefits to a small group of interstate economic actors or imposing costs on a small number of interstate actors might have an equally good chance at passage.[121] But then the Framers' goals for the centralization of commercial regulation will be undermined, this time by Congress itself. I do not think it is Chicken Little-ish to worry about federally-sanctioned protectionism creating friction among economically competitive states. Political it may be, but I seriously question the extent to which redelegation, in the way it has been exercised of late, could be regarded as "safeguarding" any of the values the DCCD embodies.

IV. CONCLUSION

Professor Zelinsky has not convinced me that little would be lost in a world in which the anti-discrimination principle and the DCCD did not exist. Discarding the anti-discrimination principle—even if it could be restricted to tax cases, which I think the logic of Professor Zelinsky's argument makes untenable—is not a "modest" doctrinal adjustment. It removes the

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[119] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 230 (1962).

[120] *See, e.g.*, CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 35, 37-38 (rev. ed. 1970) (lamenting the time the Court has to spend "on questions so lacking in legal quality, so little amenable to reasoned rule"; suggesting that Congress pass comprehensive national statutes or turn administration of rules over to administrative agencies); Michael E. DeBow, *Codifying the Dormant Commerce Clause*, 1995 PUB. INT. L. REV. 69; Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745 (1991).

[121] *See* Chen, *supra* note 100, at 1786 (discussing the Northeast Interstate Dairy Compact).

central reason for the DCCD's existence. I see little evidence that remaining doctrinal or political safeguards would be sufficient proxies.

Anti-discrimination represents a core constitutional concern of the Framers, and one that remains as relevant today—perhaps more so, given the highly integrated nature of our economy—as it was in the 1780s. Because the temptation to externalize costs for goods provided to one's citizens onto the foreign or the unpopular is universal and irresistible in times of economic hardship, I am not at all sure that political safeguards would function as Professor Zelinsky would have them at the times when they are most needed. Even congressional supervision, I fear, would likely result, not in a vindication of the principles of economic union, but, where the issue is large enough to garner the attention of Congress, in the sanctioning of protectionism and discrimination.

Professor Zelinsky's provocative critique of "discrimination" in the DCCD has, however, served a valuable function by demonstrating the degree to which "discrimination" is an ill-defined and under-theorized concept and that the Court's application of it has obscured more than it has illuminated. However, unlike Professor Zelinsky, I am not prepared to give up on the concept as illogical and incoherent. While I have not here attempted to reconceptualize the anti-discrimination principle—an omission some might regard as a dodge[122]—I think it is defensible. Given the radical nature of Professor Zelinsky's proposal, and the doctrinal upheaval it would cause, I think that he bears the burden of demonstrating why such a drastic move is necessary.

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[122] An earlier draft made an attempt, but I omitted it after I realized that it deserved its own article, which I hope to write next. For some very preliminary thoughts on where the Court has gone wrong in articulating and applying the anti-discrimination principle, and how those mistakes could be put right, see Brannon P. Denning, DaimlerChrysler Corp. v. Cuno, *State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine*, 2005-2006 CATO SUP. CT. REV. 173, 187-94.

ESSAY

THE INCOHERENCE OF DORMANT COMMERCE CLAUSE NONDISCRIMINATION: A REJOINDER TO PROFESSOR DENNING

Edward A. Zelinsky[*]

INTRODUCTION

A sound intuition animates Professor Denning's defense of the doctrinal status quo under the dormant commerce clause: the courts should not lightly abandon well-established constitutional canons. I nevertheless remain unconvinced by Professor Denning's effort to justify the long-standing interpretation of the dormant commerce clause as forbidding taxes which discriminate against interstate commerce. Whatever the historical justification for this constitutional precept, its past utility, or its visceral appeal, dormant commerce clause nondiscrimination is today doctrinally incoherent in tax contexts. The problem is not one of borderlines and close cases. Rather, at its core, the notion of dormant commerce clause tax nondiscrimination currently rests on two untenable distinctions: the distinction between tax incentives and direct expenditures and the distinction between tax provisions which are deemed discriminatory and those which are not. For two reasons, neither of these distinctions is today workable or persuasive.

First, any tax incentive can be transformed into an economically and procedurally equivalent direct spending program. Consider, for example, Hawaii's tax exemption for certain lo-

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cally-produced beverages, a tax exemption invalidated by the United States Supreme Court under the dormant commerce clause as discriminating against interstate commerce.[1] In lieu of such tax subvention, the Hawaii legislature can instead subsidize its local industry by means of direct grants, low interest loans, public infrastructure such as roads and sewers, and governmental services such as job training. The Court has declared that dormant commerce clause nondiscrimination focuses upon the "actual effect" of challenged state tax policies.[2] Unless the Court is prepared to declare that the Commerce Clause forbids equivalent non-tax forms of subvention (including routine state and local activities), Hawaii can achieve with direct spending programs the same subsidizing effect as was previously achieved by the now-forbidden tax exemption.

Second, no convincing line can be drawn between those tax provisions which are to be deemed discriminatory and those which pass dormant commerce clause muster. Besides "actual effect," the Court's other lodestar in dormant commerce clause cases has been "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[3] However, in this context, the notion of "economic protectionism" is overly broad: any tax reduction (or public service) benefits in-state taxpayers to the exclusion of non-residents. If, for example, a state lowers its general tax rates (or improves its public schools), the state thereby favors in-state economic interests and actors over businesses and persons located outside the state. Few, if any, would openly declare that general tax rate reductions discriminate for dormant commerce clause purposes though, like the more targeted tax deductions and credits the Court has stricken, general rate reductions benefit those within the state by lowering their tax burdens. There is no principled distinction between the "economic protectionism" inherent in such general tax reductions (and similar programs) and the protectionism implicit in the narrower tax incentives which the Court has invalidated as

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[1] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 263 (1984).
[2] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977).
[3] New Energy Co. v. Limbach, 486 U.S. 269, 273-74 (1988).

discriminating under the dormant commerce clause. Both tilt the economic playing field by bestowing largesse upon in-state interests, thereby encouraging firms and residents currently in the state to remain and attracting to the state businesses and firms currently outside. There is no persuasive reason to condemn on constitutional grounds some tax reductions as discriminating against interstate commerce while sparing others.

The upshot today is that an arbitrary subset of government policies and programs, i.e., certain, ill-defined tax provisions, are declared unconstitutionally discriminatory under the dormant commerce clause while other taxes and direct spending programs are not, even though these other taxes and programs are procedurally and economically equivalent to the taxes invalidated on constitutional grounds and, in protectionist fashion, favor in-state residents and actors just like the taxes abrogated as discriminatory.[4]

Professor Denning himself characterizes dormant commerce clause nondiscrimination as an "ill-defined and under-theorized"[5] concept. Professor Denning thereby suggests that the dormant commerce clause notion of nondiscrimination will eventually be rendered coherent with additional attention and effort.

I respectfully disagree. Many fine scholars, including Professor Denning himself, have worked energetically and skillfully to rationalize the concept of dormant commerce clause nondiscrimination.[6] The failure of these efforts reflects not a lack of effort, but the intractability of the problem: any tax subsidy can be transformed into a procedurally and economically equivalent direct expenditure. There is thus no point in proscribing constitutionally tax subsidies unless the same scrutiny is given to

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[4] *See* Edward A. Zelinsky, Davis v. Department of Revenue*: The Incoherence of Dormant Commerce Clause Nondiscrimination*, 44 STATE TAX NOTES 947 (2007) [hereinafter Zelinsky, *Davis*].

[5] Brannon P. Denning, *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623, 651 (2007).

[6] *See* Zelinsky, *Davis*, *supra* note 4, at 944-45. *See also* Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 47-76 (2002) (explaining in more detail) [hereinafter Zelinsky, *Restoring Politics to the Commerce Clause*].

homologous direct expenditures, including routine state and local outlays. Since most of us recoil from extending so far the dormant commerce clause doctrine of nondiscrimination, we are left with a doctrine which purports to be about "actual effect" but which arbitrarily condemns some policies as discriminating against interstate commerce, i.e., certain tax policies, while condoning others, i.e., economically and procedurally equivalent direct expenditures and tax reductions.

Moreover, the intuitively appealing admonition for states to avoid protectionism ultimately proves hollow since all state activity favors in-state residents and firms to the exclusion of nonresidents. Benefiting their residents is what states do. There is no compelling reason to characterize some policies and programs assisting in-state firms and individuals as "protectionist" discrimination against interstate commerce while deeming other activities which favor in-state persons and interests as nondiscriminatory and thus acceptable for dormant commerce clause purposes.

Abolishing the dormant commerce clause principle of nondiscrimination will not eliminate the complaints of those who believe themselves to be the victims of discriminatory taxation by the states. Rather, such abolition will shift taxpayers' complaints from the courts to Congress (which has ultimate constitutional authority over interstate commerce) and to the state legislatures (which enact the tax laws in question).

PROFESSOR DENNING'S DEFENSE OF DORMANT COMMERCE CLAUSE NONDISCRIMINATION

In response, Professor Denning mounts a four-part defense of the doctrinal status quo. He first faults my critique of dormant commerce clause nondiscrimination for its "false modesty."[7] He further invokes the concept of framing effects to defend for dormant commerce clause purposes the distinction between tax incentives and direct expenditures. Third, Professor Denning argues that I misapply the concept of discrimination by

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[7] Denning, *supra* note 5, at 629.

conflating taxpayers who are not "similarly situated."[8] Finally, Professor Denning criticizes Congress's performance supervising interstate commerce and state tax laws affecting interstate commerce. Such "congressional supervision," he concludes, occurs only "where the issue is large enough to garner the attention of Congress."[9] When Congress does intervene, it typically does not stop "state abuses" but, rather, "facilitat[es] them."[10]

None of these four arguments, I suggest, salvages dormant commerce clause nondiscrimination in tax contexts.

Professor Denning's charge of false modesty has two components. First, Professor Denning argues that the proposal to abolish dormant commerce clause nondiscrimination in tax settings will "inevitably" lead to the abandonment of the concept of dormant commerce clause nondiscrimination "in non-tax cases as well."[11] Second, Professor Denning contends that abandoning the dormant commerce clause precept of nondiscrimination is tantamount to abandoning the dormant commerce clause itself since, without a notion of nondiscrimination vis-à-vis interstate commerce, the dormant commerce clause "has little reason to exist" and "little judicially-enforceable content."[12]

As to the first of these claims, Professor Denning may well be right that, once dormant commerce clause nondiscrimination is discarded in tax contexts, it will be jettisoned in non-tax settings as well. I confess that this possibility does not fill me with dread. If, upon reflection, dormant commerce clause nondiscrimination proves as incoherent in non-tax cases as it is in tax settings, the presumption favoring long-standing constitutional principles will be overcome in those non-tax cases as well. If so, the litigants who previously challenged particular state spending and regulatory policies as discriminatory will then have the same legislative remedies as those who formerly litigated their contentions that particular state taxes discriminate against interstate commerce. Even as the courthouses close to these discrimination-claiming litigants, Congress and the state legisla-

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[8] *Id.* at 642.
[9] *Id.* at 651.
[10] *Id.* at 649.
[11] *Id.* at 631.
[12] *Id.* at 635.

tures will remain open. In the final analysis, the Commerce Clause is Congress's to enforce.

As to the second of these assertions, I strongly disagree. There will remain much important content to the dormant commerce clause even without a test of nondiscrimination. The dormant commerce clause is today understood as imposing four requirements on state taxes which affect interstate commerce:[13] such taxes must "not discriminate."[14] Such taxes must be "fairly apportioned."[15] Such taxes must be imposed on persons "with a substantial nexus with the taxing State."[16] Finally, state taxes affecting interstate commerce must be "fairly related to the services provided by the State."[17]

There is a strong (and, I think, compelling) consensus that the last of these tests—that state taxes be "fairly related to the services" furnished by the taxing state—has in practice evidenced little content.[18] However, the same cannot be said of the requirements that state taxes must be apportioned and that such taxes may only be assessed against taxpayers with adequate nexus to the taxing state. It is true that important and difficult issues arise as to these two tests, as they do in all constitutional settings. There is, for example, much disagreement today whether nexus requires a taxpayer's physical presence within the taxing state.[19] Moreover, these two tests, again like all other constitutional precepts, are not self-executing. New York's courts, for example, have been notoriously resistant to

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[13] The classic statement of these four requirements is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 274 (1977).

[14] *Id.* at 279.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See, e.g.*, 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION: CONSTITUTIONAL LIMITATIONS AND CORPORATE INCOME AND FRANCHISE TAXES ¶ 4.17[2][E] (3d ed. 1998); Robert D. Plattner, *Vantage Point: New York's "Convenience of the Employer" Doctrine—A Role for* Complete Auto Transit*'s Fourth Prong*, 2003 STATE TAX TODAY 129-29 (July 7, 2003).

[19] *See* Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W. Va. 2006), *cert. denied*, 127 S. Ct. 2997 (2007); Lanco, Inc. v. Dir., Div. of Taxation, 908 A.2d 176 (N.J. 2006), *cert. denied*, 127 S. Ct. 2974 (2007); HELLERSTEIN & HELLERSTEIN, *supra* note 18, ¶ 6.11; 2 RICHARD D. POMP & OLIVER OLDMAN, STATE AND LOCAL TAXATION 11-215 (5th ed. 2005).

apportioning the income of nonresidents on days such nonresidents telecommute from their out-of-state homes.[20]

These interpretive issues, the standard grist of the constitutional mill, do not belie the significance of the dormant commerce clause norms of apportionment and nexus. On the contrary, these controversies highlight the importance of these norms. Abolishing the dormant commerce clause test of nondiscrimination will leave intact the apportionment and nexus requirements under that clause. The dormant commerce clause will thus remain central to the constitutional jurisprudence of state and local taxation.

Professor Denning's second major argument for the doctrinal status quo is that taxes and direct expenditures should be treated differently for dormant commerce clause purposes since a significant number of individuals succumb to framing effects and thus fail to appreciate the economic equivalence of tax incentives and direct outlays. To buttress this argument, Professor Denning notes that I have been among those who have documented the existence of tax-related framing effects: many individuals (even well-educated individuals) perceive tax incentives as somehow different from economically and procedurally equivalent tax incentives.[21] Professor Denning's second argument is thus a friendly but pointed effort to hoist me on my own scholarly petard: direct "subsidies are just seen (both as a matter of history and in accord with current practice) as different" from tax incentives.[22] Consequently, Professor Denning reasons,

> [t]o the extent that certain governmental actions (subsidies, for example) are not perceived by others as imposing a burden on out-of-state commerce or out-of-state commercial actors, it is less likely that those actions will stimulate retaliatory re-

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[20] *See* Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 276 (2005), *cert. denied*, 126 S. Ct. 546; Zelinsky v. Tax Appeals Tribunal, 769 N.E.2d 464 (2003), *cert. denied*, 541 U.S. 1009 (2004); Edward A. Zelinsky, *Employer Convenience, Telecommuting and the Constitution: The Empire State Really Strikes Back*, 40 STATE TAX NOTES 451 (2006). In the interests of full disclosure, I note that I was the telecommuting taxpayer in the *Zelinsky* litigation.

[21] Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and The Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797 (2005).

[22] Denning, *supra* note 5, at 638.

> sponses aimed at the enacting state, its products, or its citizens.[23]

Hence, the argument concludes, the courts must preempt retaliation between the states by superintending state tax policies under the dormant commerce clause. However, the courts need not police economically comparable direct outlays. These direct outlays are irrationally but consistently perceived by many as different from their tax incentive equivalents and are thus less politically provocative.

Professor Denning does not acknowledge the sweeping nature of this argument which sub silentio recasts the rationale for the dormant commerce clause nondiscrimination principle from substantive concern with the economic impact of state taxes to procedural regard for the states' internal political processes. The Court has stated that dormant commerce clause nondiscrimination focuses upon the "actual effect" of state tax policies on interstate commerce.[24] Professor Denning would shift the focus of the nondiscrimination principle from this substantive concern with the "actual effect" of particular state taxes to the procedural likelihood of states' "retaliatory responses" to each others' tax policies.

This is no diffident fine-tuning of existing doctrine, but rather a fundamental reconstruction of the justification for dormant commerce clause nondiscrimination. If, as Professor Denning suggests of my analysis, false modesty is cause for concern, the red flags should be flying at this point in Professor Denning's argument.

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[23] *Id.* at 641.

[24] The exception to this statement is *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). *See* Zelinsky, *Restoring Politics to the Commerce Clause*, *supra* note 6, at 40-42, 64-69.

Moreover,[25] what Professor Denning bemoans as retaliation others would praise as interstate competition. If state A attempts to lure an employer from state B with tax credits and exemptions, state B might well respond with its own package of incentives to retain that employer. Many economists[26] and legal scholars[27] view state B's response in this scenario as constituting not an undesirable riposte, but rather as embodying beneficial interstate competition.

In the alternative, suppose that state C reduces its general corporate income tax rate to improve its business climate and that adjoining state D responds by matching that decrease. Again, rather than denounce D for retaliating against C's tax rate reductions, many public finance mavens would view D as legitimately competing in the inter-jurisdictional marketplace.

One need not believe that all forms of interstate tax competition are equally benign[28] to be skeptical of Professor Denning's concept of retaliation and to consequently doubt that the likelihood of retaliation should be the touchstone for dormant commerce clause nondiscrimination.

Finally, if "retaliatory" state tax policies are perceived as a significant problem, Congress, exercising its affirmative authority under the Commerce Clause, can legislate to address this problem. As I will discuss *infra*, Professor Denning and I disagree as to the comparative advantage of legislative as opposed

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[25] Some Founders feared that the states would resolve disputes over tax policy by calling out their respective militias. In *Federalist* No. 7, Hamilton argued that if the Constitution were not adopted, New York's duties on imports could lead to armed conflict with Connecticut and New Jersey. THE FEDERALIST No. 7 (Alexander Hamilton). While Hamilton was right in his time to be concerned about this possibility, few of us are today. As I know from personal experience, today Connecticut responds to New York's unfair taxation of Connecticut's residents by litigating and legislating, not by calling out the National Guard. *See, e.g.*, Brief of Richard Blumenthal, AG of Conn. in Support of Petitioner, Zelinsky v. Tax Appeals Tribunal, 541 U.S. 1009 (2004) (No. 03-1177); The Telecommuter Tax Fairness Act of 2007, S. 785, 110th Cong. (2007); The Telecommuter Tax Fairness Act of 2007, H.R. 1360, 110th Cong. (2007).

[26] *See* THE TIEBOUT MODEL AT FIFTY (William A. Fischel ed., 2006).

[27] For my own ruminations on this subject, see Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665 (1998).

[28] I do not. For example, I share, on tax policy grounds, the skepticism of the *Cuno* plaintiffs about the kind of targeted tax credits they challenged. I disagree with them that, as a matter of law, such credits are unconstitutional. Edward A. Zelinsky, Cuno*:* *The Property Tax Issue*, 4 GEO. J. OF L. AND PUB. POL'Y 119 (2006); Edward A. Zelinsky, *Ohio Incentives Decision Revisited*, 37 STATE TAX NOTES 859 (2005).

to judicial decision making under the Commerce Clause. For now, I simply observe that Congress has ample authority to address any problem vis-à-vis retaliatory state tax policies, assuming such a problem exists.

Professor Denning's third major argument is that I misapply the concept of discrimination by conflating taxpayers who should be treated separately. Discrimination occurs, he plausibly contends, when distinctions are made among "similarly-situated parties."[29] Since taxpayers located outside any given state are beyond that state's "taxing jurisdiction,"[30] there is no discrimination when the state reduces its general tax rates to benefit in-state residents and firms since out-of-state citizens are not similarly-situated to those in-state.

Under this eminently reasonable approach, every dormant commerce clause nondiscrimination tax case is wrongly decided: if in-state firms and residents are dissimilarly situated in the context of general rate reductions, they must also be dissimilarly situated when more targeted tax benefits are at issue. If so, the in-state firms benefiting from "discriminatory" tax subsidies are, by virtue of their in-state locations, situated differently from their out-of-state competitors. The tax subsidies stricken as "discriminatory" should instead pass constitutional muster since the in-state recipients of those subsidies are not situated similarly to their out-of-state competitors.

Consider, again, Hawaii's tax exemption subsidizing certain locally-produced beverages,[31] an exemption invalidated by the United States Supreme Court as discriminating against interstate commerce. In the context of general tax rate reductions, Professor Denning tells us, out-of-state manufacturers are, by virtue of their out-of-state locations, not situated similarly to Hawaii's in-state producers. Hawaii can thus adopt a broad tax reduction which benefits only in-state firms. If so, Hawaii should also be able to extend more narrow tax subsidies to particular Hawaii firms since in-state industry is not situated similarly to its out-of-state competitors. In the context of targeted

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[29] Denning, *supra* note 5 at 642.

[30] *Id.*

[31] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

tax benefits also, non-Hawaii firms fall outside the state's tax jurisdiction and are thus not situated similarly to the in-state businesses within that jurisdiction. The *Bacchus* Court was thus wrong to declare that the dormant commerce clause requires Hawaii's tax laws to treat in-state firms in the same way as their dissimilarly situated out-of-state competitors.

Likewise, out-of-state goods shipped into Hawaii are, by virtue of their geographic origin, not similarly situated to products manufactured in-state. Again, the holding of *Bacchus*—Hawaii discriminates unconstitutionally when it extends tax subsidies only to locally-produced beverages—proves unpersuasive if, in the context of general rate reductions, products manufactured in-state are not situated similarly to products brought to Hawaii from out-of-state.

Consider as a second example Ohio's sales tax credit for ethanol produced in-state, another tax subsidy invalidated by the Court as discriminating against interstate commerce for dormant commerce clause purposes.[32] The Court's decision is correct under Professor Denning's test of similar situation only if Ohio must treat out-of-state ethanol manufacturers and their product as situated similarly to Ohio's domestic producers of ethanol and their Ohio-based output. If so, are not these in-state and out-of-state producers and products also situated similarly for purposes of evaluating non-tax subsidies and general tax reductions? Suppose Ohio benefits a domestic manufacturer of ethanol by building roads and sewers to the manufacturer's new plant or by providing job training for its Ohio workforce. If tax-based assistance limited to this Ohio manufacturer discriminates because this domestic manufacturer is similarly situated to its out-of-state competitors, the dormant commerce clause must also proscribe these other forms of assistance, given to this domestic firm but not to its similarly situated out-of-state rivals.

In short, Professor Denning's similarly situated test does not extract us from the doctrinal morass which is dormant commerce clause tax nondiscrimination. If in-state firms can receive general tax rate reductions because such firms are dif-

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[32] New Energy Co. v. Limbach, 486 U.S. 269, 273-74 (1988).

ferently situated from their out-of-state competitors, such in-state firms should also be able, by virtue of that geographical difference, to receive the narrowly targeted tax benefits which have been stricken by the Court as discriminatory.

Consider, finally, Professor Denning's misgivings about Congress as the ultimate regulator of interstate commerce. Of course, the text of the Constitution is explicit: It is the job of Congress, not the judiciary, "[t]o regulate Commerce . . . among the several States."[33]

The Framers' decision to assign to Congress the authority to supervise interstate commerce has a particularly contemporary ring since the national legislature has far greater institutional capacity to supervise a complex modern economy than do the courts. The courts can, at best, give episodic attention to specific cases brought to them by litigants. Because they are limited to particular "Cases...[and] Controversies,"[34] the courts cannot engage in sustained and continuous oversight. The courts lack specialized expertise and staff. Taxation is a matter of balancing the interests of different constituencies and fashioning compromises among competing interests and concerns. The judiciary is poorly-suited for such political and often arbitrary decision making.

In all these respects, Congress is better positioned than the courts to exercise final authority over interstate commerce including oversight of the states' tax policies affecting such commerce. Congress has specialized committees and expert staff as well as the ability to undertake sustained and ongoing superintendence and study. Taxation is an inherently political topic. Political decision making is best confided to the political branch.

This is not to say that Congress's performance in this, or in any other area, is ideal. If the relevant comparison is between the messy realities of congressional decision making and an idealized notion of judicial performance, it is easy to pick a winner. If, however, we confront the more sober choice between the legislative process as it actually exists and the realities of judicial decision making under the dormant commerce clause, Congress

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[33] U.S. CONST. art. I, § 8.
[34] U.S. CONST. art. III, § 2.

emerges as the better forum for resolving disputes about "discriminatory" state tax policies.

Professor Denning indicts Congress for many of the laws it has enacted under the Commerce Clause.[35] As to some of these laws, I share Professor Denning's policy preferences. On the other hand, I confess that I am not alarmed by Congress's approval of state laws favoring resident hunters and fishermen.[36]

In any event, my disagreement with some of Congress's choices under the Commerce Clause does not imply that the courts are better for resolving issues of interstate commerce and state tax policy. Indeed, a fundamental paradox arises in Professor Denning's analysis: He dismisses the courts' bad decisions as "wrongheaded"[37] applications of the dormant commerce clause's nondiscrimination principle, rather than as evidence that the principle itself is flawed. In contrast, when Congress adopts legislation with which Professor Denning disagrees, he cites such legislation, not as evidence of similar misapplication, but rather as proof that Congress is inadequate to the task of regulating interstate commerce. Why do the courts' mistakes not similarly suggest that something is fundamentally amiss with their decision making capacity?

Professor Denning also criticizes Congress for using the Commerce Clause to grant "concentrated benefits to well-organized interest groups"[38] and to focus upon "issue[s] of interest to a very broad group of states."[39] But this is how democracy works. Legislators respond to organized interests and to salient issues. In this respect, there is nothing special about Congress acting under the Commerce Clause.

It is, moreover, these same "well-organized interest groups" which bring the expensive and time consuming litigation claiming discrimination under the dormant commerce clause, e.g., regional stock exchanges,[40] ethanol producers,[41] tax-exempt

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35 Denning, *supra* note 5, at 648-50.
36 *Id.* at 648-49.
37 *Id.* at 643.
38 *Id.* at 649.
39 *Id.*
40 Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).
41 New Energy Co. v. Limbach, 486 U.S. 269, 273-74 (1988).

bond investors.[42] If there is something untoward about the ability of these groups to obtain succor from Congress under the Commerce Clause, there should also be something unsettling about the demonstrated capacity of these groups to achieve their goals in the courts.

At the end of the day, Congress is better positioned than are the courts to provide the kind of ongoing, inherently political supervision of interstate commerce and state taxation required by an integrated modern economy.

CONCLUSION

Like a once-great champion who refuses to leave the ring, the dormant commerce clause prohibition on discriminatory taxation stumbles along well past its prime. In Professor Denning, this time-honored prohibition has an energetic and erudite defender. However, in the final analysis, the champ's best days are in the past.

Whatever the historical value of the dormant commerce clause principle of tax nondiscrimination, the principle today is doctrinally incoherent. Any tax incentive can be converted into an economically and procedurally equivalent direct spending program. Moreover, no convincing border can be drawn between those tax provisions which are to be deemed discriminatory and those which are not. Consequently, today an arbitrary subset of government policies and programs, i.e., certain ill-defined tax provisions, are declared unconstitutionally discriminatory under the dormant commerce clause while other taxes and direct spending programs pass Commerce Clause muster, even though these other taxes and programs are procedurally and economically equivalent to the taxes invalidated on constitutional grounds and, in protectionist fashion, benefit in-state residents and actors just like the taxes stricken as discriminatory. Disputes over "discriminatory" taxation are best resolved politically, in Congress and the state legislatures.

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[42] Davis v. Dep't of Revenue, 197 S.W.3d 557 (Ky. Ct. App. 2006), *cert. granted*, 127 S. Ct. 2451 (2007). *See also*, Zelinsky, *Davis*, *supra* note 4, at 947.

The constitutional precept of dormant commerce clause nondiscrimination performed honorable and useful service to the nation in tax cases. It is now time for the former champ to lay down his gloves.

COMMENT

Nightmare on Your Street: Moving Towards Justice for Innocent Victims of Wrong-Premises SWAT Raids

I. INTRODUCTION

On the night of November 21, 2006, Atlanta police raided a home in a crime-ridden Atlanta neighborhood, purportedly to arrest a drug-dealer whom an informant allegedly claimed would be found there.[1] Instead, they were met by Kathryn Johnston, the ninety-two year-old woman who actually resided in the home, which donned an exterior wheelchair ramp.[2] As officers battered down her front door, Johnston, undoubtedly scared senseless and thinking her home was being burglarized,[3] defended herself the best way she knew how. She found the rusty revolver she kept for self-defense and fired at the intruders in a desperate effort to protect herself.[4] Three of the officers were wounded, but Johnston was not so lucky.[5] Police shot her dead in her home of twenty years.[6] Less than three months later, one of the officers involved in the botched raid would admit to federal investigators that police lied to the magistrate to

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[1] Brenda Goodman, *Police Kill Woman, 92, In Shootout at Her Home*, N.Y. TIMES, Nov. 23, 2006, at A35.

[2] *Id.*; S.A. Reid & Bill Torpy, *Slain Woman Mourned*, ATLANTA J. CONST., Nov. 29, 2006, at A1.

[3] An elderly woman had recently been raped in Johnston's drug-ridden neighborhood, adding to her already understandable fears. Goodman, *supra* note 1.

[4] *Id.*; Bill Torpy, *Cop Murder Charges Sought*, ATLANTA J. CONST., Feb. 8, 2007, at A1.

[5] Goodman, *supra* note 1.

[6] *Id.*; Reid & Torpy, *supra* note 2.

obtain the search warrant.[7] The police had raided the wrong house.[8]

Closer to home, in the early morning hours of March 23, 2006, a SWAT-style unit in Horn Lake, Mississippi, stormed the Horn Lake residence of Arthur and Lillie Bostick, both in their eighties, in search of a methamphetamine lab.[9] Police later learned the methamphetamine lab was in the house next door, but not before officers had roughed up the Bosticks, sending them both to the hospital.[10] Mr. Bostick suffered bruised ribs and a ruptured spleen while Mrs. Bostick sustained a broken collarbone and a dislocated shoulder.[11] The Bosticks would subsequently file suit in federal court in Oxford, Mississippi, seeking $2 million in damages for violations of their constitutional rights.[12] The Horn Lake incident represents yet another unfortunate example of police raiding the wrong home.

Wrong-premises raids, typically conducted by paramilitary SWAT[13] units, are becoming an exceedingly frequent occurrence in the United States. On a national level, hundreds of wrong-premises SWAT raids occur each year.[14] An estimated forty innocent people have been killed (and dozens more injured) in

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[7] Torpy, *supra* note 4. The police told the magistrate an informant had purchased $50 of crack cocaine at Johnston's house from a man named "Sam." Reid & Torpy, *supra* note 2. Less than two weeks after the raid occurred, the informant told an Atlanta television station that he was never at the house and that "Sam" did not exist. *Id.*

[8] Goodman, *supra* note 1.

[9] William C. Bayne, *Owners Sue After House Is Raided*, COM. APPEAL (Memphis), Oct. 10, 2006, at DSA1; William C. Bayne, *Police Tactics in Bust Studied*, COM. APPEAL (Memphis), Mar. 24, 2006, at DSB1.

[10] Bayne, *Owners Sue After House Is Raided*, *supra* note 9; Bayne, *Police Tactics in Bust Studied*, *supra* note 9.

[11] Bayne, *Owners Sue After House Is Raided*, *supra* note 9.

[12] *Id.*

[13] SWAT is an acronym for "Special Weapons and Tactics." RADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 1 (The Cato Institute 2006), *available at* http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf. For a detailed history of the origins and development of the SWAT concept, see *id.* at 4-9.

[14] *Id.* at 4. Many of these botched raids can be attributed to faulty information provided by informants, or so-called "snitches." *Id.* at 3. "These informants are notoriously unreliable. Most tend to be drug dealers . . . looking to knock off competitors, convicted criminals or charged suspects looking to trade information for a reduction in sentence or less serious charges, or professional informants who get a cut of any money or assets seized." *Id.* at 21.

wrong-premises raids in the last twenty years.[15] This alarming trend tracks a staggering increase in the use of SWAT units to serve routine search warrants since the 1980s.[16] During that time, Congress, under pressure from the Reagan Administration, ramped up the so-called "War on Drugs," softening the Posse Comitatus Act and implementing a Pentagon giveaway program designed to put military equipment in the hands of local police departments.[17] The inflow of free or discounted equipment coupled with federal funding resulted in the creation

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[15] Radley Balko, *Botched Raids Not Rare*, ATLANTA J. CONST., Dec. 4, 2006, at A13. The following description of SWAT team tactics is offered to give the reader a better understanding of what innocent victims of wrong-premises SWAT raids contend with when police get the wrong address:

> The typical SWAT team carries out its missions in battle fatigues: Lace-up, combat-style boots; black, camouflage, or olive-colored pants and shirts, sometimes with "ninja-style" or balaclava hoods; Kevlar helmets and vests; gas masks, knee pads, gloves, communication devices, and boot knives; and military-grade weapons, such as the Heckler and Koch MP5 submachine gun, the preferred model of the U.S. Navy Seals. Other standard SWAT-team weaponry includes battering rams, ballistic shields, "flashbang" grenades, smoke grenades, pepper spray, and tear gas. Many squads are now ferried to raid sites by military-issue armored personnel carriers. Some units have helicopters. Others boast grenade launchers, tanks (with and without gun turrets), rappelling equipment, and bayonets.
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> Paramilitary raids are generally carried out late at night, or just before dawn. . . .
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> Police generally break open doors with a battering ram, or blow them off their hinges with explosives. . . . [P]olice have pried doors open with sledgehammers or screwdrivers, ripped them off by attaching them to the back ends of trucks, or entered by crashing through windows or balconies. . . . Once police are inside, the occupants are quickly and forcefully incapacitated. The[y] [are] instructed to remain in the prone position, generally at gunpoint, while police carry out the search warrant. Any perceived noncompliance is typically met with force, which can potentially be lethal, depending on the nature of the noncompliance.

BALKO, *supra* note 13, at 5.

[16] BALKO, *supra* note 13, at 3, 6-9.

[17] *Id.* at 7-8. Between January 1997 and October 1999, for instance, the Pentagon filled 3.4 million orders of Pentagon equipment from over 11,000 local police agencies in all fifty states. *Id.* at 8. The purchase value of the equipment distributed exceeded $727 million and included the following: "253 aircraft (including six- and seven- passenger airplanes, and UH-60 Blackhawk and UH-1 Huey helicopters), 7,856 M-16 rifles, 181 grenade launchers, 8,131 bulletproof helmets, and 1,161 pairs of night-vision goggles." *Id.* By December 2005, the number of local law enforcement agencies ordering Pentagon equipment had risen to 17,000 nationwide. *Id.*

of thousands of SWAT units throughout the country.[18] In the past twenty-five years, the frequency of dynamic-entry SWAT raids has increased by a whopping 1300% to number approximately 50,000 per year nationwide.[19] Concomitant with this overall increase, wrong-premises raid fiascos have become so commonplace that the New York Police Department actually circulated a memo in 1998 instructing police officers how to contact locksmiths and door repair services after raiding a wrong address.[20] Unfortunately, wrong-premises SWAT raids continue to plague scores of innocent citizens each year in cities and towns throughout the United States.[21]

As one may surmise, innocent victims of wrong-premises SWAT raids frequently suffer physical injuries and property damage in addition to the emotional distress that accompanies the trauma of a wrong-premises raid. Even more troubling is the risk to human life posed by wrong-premises SWAT raids. SWAT units typically execute no-knock search warrants in the hours just before dawn, waking the inhabitants of the target residence from deep sleep.[22] Innocent citizens are nightmarishly confronted with screaming men, flashbang grenades, and all manner of chaotic pandemonium in their own bedrooms, all in their first waking moments.[23] Understandably disoriented and quite reasonably in fear for their lives and the lives of family members, many victims instinctively reach for weapons and some open fire on the intruders.[24] This eminently justifiable reaction invariably leads to tragedy as SWAT officers perceive

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[18] *Id.* at 8. By 1997, ninety percent of cities having populations of at least 50,000 had at least one SWAT unit. *Id.* at 9. The same could be said in 1996 of sixty-five percent of towns with populations of 25,000 to 50,000. *Id.* It is safe to assume these numbers are significantly higher today. *Id.* Moreover, SWAT teams are becoming exceedingly commonplace in even smaller towns. *Id.*

[19] Balko, *supra* note 15.

[20] BALKO, *supra* note 13, at 46.

[21] *See id.* at 43-63 (cataloguing an extensive list of wrong-premises SWAT-style raids occurring between 1995 and April 2006). Following the highly publicized death of Alberta Spruill after a wrong-premises raid in May of 2003, the Borough of Manhattan established a hotline for victims of wrong-premises no-knock raids. The hotline generated over 100 calls in its first week of operation. *Id.* at 43-44, 47.

[22] *Id.* at 32.

[23] *See id.*

[24] *See id.* at 20.

any defensive movement as an act of aggression warranting lethal force.[25]

In spite of the grave ramifications of wrong-premises SWAT raids for the victims of such unfortunate incidents, the powers-that-be have remained curiously indifferent to their plight.[26] Many police and government officials have dismissed wrong-premises SWAT raids as "regrettable, but inevitable and acceptable, consequences of the War on Drugs."[27] But perhaps most striking from a legal standpoint is the barrage of impediments that victims of wrong-premises SWAT raids confront when they seek redress in the courts.[28] The complicated collection of rules governing the relevant causes of action available to these victims makes the recovery of even compensatory damages extraordinarily difficult.[29] Indeed, in some instances, such victims are left remediless under current law.[30] Such a harsh result is inherently unjust in an American legal tradition so steeped in Fourth Amendment jurisprudence and common law compensatory tort doctrine. The governing law begs for reform.

Under current law, victims of wrong-premises SWAT raids[31] may pursue two avenues of legal redress: (1) a constitutional tort action under 42 U.S.C. § 1983 and/or (2) any available state-law causes of action. Federal and state-law claims may be joined in one action and brought simultaneously in federal or state court.[32] This comment will briefly discuss federal and Mississippi state-law remedies in turn, emphasizing the remedial shortcomings of each in the context of wrong-premises SWAT litigation. Following this discussion, this comment will

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[25] *See id.*

[26] *See id.* at 29, 36, 60.

[27] *Id.* at 29. "Unless a botched raid generates significant media coverage, the civilians on the other end can expect little compensation for their trauma." *Id.* at 36. One city attorney, commenting on a particularly egregious wrong-premises raid that occurred in Hallandale, Florida, in February of 1999, told the *Miami Herald* that "[t]he way [the innocent victims of the wrong-premises raid] were treated has to be judged in the context of a war." *Id.* at 60.

[28] *See infra* Part II.A-B.

[29] *Id.*

[30] *Id.*

[31] Hereinafter periodically referred to as "SWAT-victim plaintiffs."

[32] 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW–SUBSTANCE & PROCEDURE § 19.15 (3d ed. 1999).

offer specific proposals for statutory reform at both the federal and state levels.

II. SWAT-VICTIM PLAINTIFFS' LEGAL RECOURSE UNDER CURRENT LAW

A. Federal Law: Constitutional Tort Actions (§ 1983)

Section 1983 has emerged as the principal legal vehicle permitting recovery of damages for constitutional infringements of individual civil rights by local government officials and municipalities.[33] Under § 1983, SWAT-victim plaintiffs may initiate suits against individual police officers,[34] municipal governments,[35] or both. As will be seen, the body of precedent spawned by § 1983 has imposed considerable obstacles to recovery of damages by SWAT-victim plaintiffs regardless of the type of defendant sued.

i. Suits Against Individual Police Officers

Section 1983 permits SWAT-victim plaintiffs to sue officers involved in obtaining the search warrant or officers involved in the actual raid (or both). In either case, SWAT-victim plaintiffs

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[33] *See* Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 831 (2005). *See also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.1 (5th ed. 2007). Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000). A plaintiff suing under § 1983 must ultimately establish proof of four elements: (1) deprivation of a federally protected right, (2) causation, (3) deprivation by a "person" within the interpreted meaning of § 1983, and (4) deprivation effectuated under color of state law. *See* Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 527 (2001).

[34] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[35] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690, 694 (1978).

suing individual police officers will almost certainly confront the defendant officers' timely assertion of qualified immunity.[36]

Qualified immunity shields individual officers from civil liability under § 1983 provided "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[37] The Supreme Court has consistently characterized qualified immunity as an *immunity from suit* and *not* merely an affirmative defense to liability.[38] Thus, the Court has attempted to structure the qualified immunity standard in such a way as to facilitate prompt resolution of qualified immunity claims via summary judgment[39]—that is, at the "'earliest possible stage in litigation.'"[40]

The Supreme Court has delineated what is essentially a three-part test for determining whether an individual officer is entitled to qualified immunity.[41] As a threshold issue, the court must determine whether the officer violated a constitutional right.[42] If so, the court must then determine whether the right was "clearly established."[43] Only if both inquiries yield affirmative answers must the court then decide the dispositive question: "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*."[44] In other

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[36] *See generally* Karan R. Singh, Note, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 710 (2001).

[37] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The *Harlow* Court articulated the qualified immunity standard as an objective standard, to be defined "essentially in objective terms." *Id.* at 819.

[38] Saucier v. Katz, 533 U.S. 194, 200-01 (2001). *See also* Schwartz, *supra* note 33, at 540-41; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236-37 (2006).

[39] *See* Chen, *supra* note 38, at 237, 242, 251.

[40] *Saucier*, 533 U.S. at 201 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)). Three policy considerations undergird the doctrine of qualified immunity: (1) concern regarding the unfairness inherent in holding public officials personally liable for performance of public duties; (2) the likelihood that exposure to civil liability will deter public officials not only from unconstitutional conduct but also from constitutional conduct that is beneficial to the public; and (3) substantial social and monetary costs incurred in defending constitutional tort actions, many of which may lack merit. Chen, *supra* note 38, at 236-37.

[41] *Saucier*, 533 U.S. at 201-02.

[42] *Id.* at 201.

[43] *Id.*

[44] *Id.* at 202 (emphasis added).

words, the police officer will be granted qualified immunity, and hence dismissed from the action, if either of two conditions materialize: (1) the constitutional right was not clearly established *or* (2) the officer's conduct was objectively reasonable under the fact-specific circumstances.[45]

Qualified immunity presents a substantial, often insurmountable, obstacle to SWAT-victim plaintiffs suing individual officers under § 1983.[46] The objective standard of qualified immunity gives rise to a confounding paradox in Fourth Amendment cases: an officer can be found to have acted *unreasonably* under the Fourth Amendment standard yet *reasonably* for qualified immunity purposes.[47] Consequently, even in cases where the SWAT-victim plaintiff succeeds in establishing a constitutional violation, the offending officer(s) may still be granted qualified immunity.[48] Moreover, the Supreme Court has remarked that qualified immunity is intended to "protect[] 'all but the plainly incompetent or those who knowingly violate the law.'"[49] As a result of these realities, a high percentage of § 1983 actions result in the dismissal of individual defendants on grounds of qualified immunity.[50] As qualified immunity threatens from the very outset to derail SWAT-victim plaintiffs'

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[45] Anderson v. Creighton, 483 U.S. 635, 641 (1987). *See* Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense:* Hope*'s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 574-75 (2006). The Court has lately muddied the traditional "clearly established" right analysis by introducing the concept of "fair warning." Hope v. Pelzer, 536 U.S. 730, 741 (2002). *But see* Brosseau v. Haugen, 543 U.S. 194, 198-99 (2004).

[46] *See generally* Singh, *supra* note 36, at 710-11; Chen, *supra* note 38, at 233-34 (noting that in developing the qualified immunity doctrine, "the Supreme Court . . . has established substantial barriers to . . . suits against public officials"); Chen, *supra* note 38, at 229-30 (noting that "[o]ne judge recently confessed that '[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face'").

[47] Schwartz, *supra* note 33, at 546. "An offic[er] can act reasonably unreasonably. It gets the mind spinning at some point." *Id. See also* Chen, *supra* note 38, at 252 (noting the *Saucier* Court's conclusion "that the Fourth Amendment reasonableness standard [is] not coextensive with the qualified immunity standard").

[48] Where the record is indicative of a Fourth Amendment violation but the case is very close, an officer may be granted qualified immunity even when the specific facts of the case are in dispute. Chen, *supra* note 38, at 252.

[49] *Saucier*, 533 U.S. at 202 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[50] Schwartz, *supra* note 33, at 547. Qualified immunity is "just a rung below" absolute immunity. *Id.*

suits against individual police officers,[51] the availability of a § 1983 action against police officers represents a wholly inadequate remedy for victims of wrong-premises SWAT raids.

ii. Suits Against Municipalities

In addition to authorizing constitutional tort actions against individual police officers, § 1983 permits suits for monetary damages against municipalities.[52] Unlike individual § 1983 defendants, municipalities may not evade liability by invoking qualified immunity.[53] To the benefit of municipalities, however, the Supreme Court has held that a municipality cannot be held vicariously liable for the actions of its employees under the theory of respondeat superior.[54] Consequently, the SWAT-victim plaintiff may recover from the municipality *only* if he succeeds in proving that the municipality is liable in its own right.[55] To date, the Court has recognized four principal grounds for imposing municipal liability under § 1983: (1) policy-based liability,[56] (2) custom-based liability,[57] (3) training-based liability,[58] and (4) hiring-based liability.[59] In addition to proving liability on one of these grounds, the SWAT-victim plaintiff must establish causation.[60] Each of these elements will be discussed briefly in turn. As will be seen, the SWAT-victim plaintiff seeking damages from a municipality faces an uphill battle.

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[51] *See* Leah Chavis, *Qualified Immunity After* Hope v. Pelzer*: Is "Clearly Established" Any More Clear?*, 26 U. ARK. LITTLE ROCK L. REV. 599, 600 (2004).

[52] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). In *Monell*, the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that municipalities do in fact constitute "persons" under § 1983. *Monell*, 436 U.S. at 690-91.

[53] Owen v. City of Independence, 445 U.S. 622, 650 (1980).

[54] *Monell*, 436 U.S. at 691.

[55] *Id.*; City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988).

[56] *Monell*, 436 U.S. at 690.

[57] *Id.* at 690-91.

[58] City of Canton v. Harris, 489 U.S. 378, 380 (1989) (holding that failure to train municipal employees can be grounds for imposing liability on a municipality under § 1983).

[59] Bd. of County Comm'rs v. Brown, 520 U.S. 397, 411 (1997) (identifying requisite conditions for imposing liability on a municipality under § 1983 for failure to scrutinize an applicant's background prior to hiring).

[60] *See* Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 661 (1999).

To hold a municipality liable on policy-based grounds, the SWAT-victim plaintiff must prove that the constitutional violation resulted from the execution of an official municipal policy.[61] The policy at issue does not have to derive from the highest level of municipal government.[62] Nevertheless, liability may attach only when the decision-maker who promulgated the policy had final policymaking authority with respect to the action ordered.[63] State law will determine whether a given individual had final policymaking authority in such circumstances.[64]

Custom-based liability may be imposed only if the SWAT-victim plaintiff can prove the existence of a long-standing municipal practice having the effect of policy though never formally adopted by municipal policymakers.[65] The Court has held that such practices must be sufficiently "permanent and well settled as to constitute a 'custom or usage' with the force of law."[66]

Training-based liability may be imposed on municipalities in limited circumstances.[67] To establish municipal liability on this ground, the SWAT-victim plaintiff must prove that the municipality's failure to train its police and SWAT personnel reflects the municipal government's "deliberate indifference" to the rights of citizens with whom law enforcement personnel come into contact.[68] It is not enough that a particular officer was unsatisfactorily trained or that an otherwise sound training program was negligently administered.[69]

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[61] *Monell*, 436 U.S. at 690. *See* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2188 (2005); Hawke, *supra* note 33, at 840-41.

[62] *See Monell*, 436 U.S. at 660-61, 690. *See* Beermann, *supra* note 60, at 652; Hawke, *supra* note 33, at 841.

[63] Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986). The Court stated that "[t]he fact that a particular official . . . has discretion in the exercise of particular functions does not, without more, give rise to municipal liability . . . . The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Id.* at 481-83. The Court has held that liability can flow from a single decision under appropriate circumstances. *Id.* at 480.

[64] *Id.* at 483.

[65] *See* Hawke, *supra* note 33, at 842; Achtenberg, *supra* note 61, at 2188.

[66] *Monell*, 436 U.S. at 691.

[67] City of Canton v. Harris, 489 U.S. 378, 387 (1989). A single incident of unconstitutional activity is insufficient to impose municipal liability on the basis of inadequate training. City of Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985).

[68] *Harris*, 489 U.S. at 388-89.

[69] *Id.* at 390-91.

Hiring-based liability is predicated on the municipality's failure to adequately screen applicants prior to hiring them.[70] To establish hiring-based liability, the SWAT-victim plaintiff must prove that "adequate scrutiny of an applicant's background would [have led] a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right . . . ."[71]

Underlying all four theories of liability is the requirement that the municipality *itself* must have caused the alleged constitutional violation.[72] That is, the SWAT-victim plaintiff must establish a "direct causal link" between the municipality's policy, custom, etc., and the purported constitutional deprivation.[73] The municipal action must be the "moving force" behind the SWAT-victim plaintiff's injury.[74]

As municipalities are not subject to vicarious liability under § 1983, SWAT-victim plaintiffs seeking compensation from a municipality face an uphill fight.[75] The complicated rules governing the imposition of municipal liability have resulted in what one commentator has labeled "a 'doctrinal mess,' for which the Supreme Court is responsible."[76] Moreover, the current standards of liability weigh decidedly in the favor of municipalities.[77] Establishing municipal liability is often difficult if not

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[70] *See* Achtenberg, *supra* note 61, at 2189.

[71] Bd. of County Comm'rs v. Brown, 520 U.S. 397, 411 (1997).

[72] *Harris*, 489 U.S. at 385.

[73] *Id.* In the words of Justice Rehnquist, "[a]t the very least there must be an affirmative link between the [municipal action] and the particular constitutional violation alleged." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985).

[74] *See Brown*, 520 U.S. at 405.

[75] *See, e.g.*, Hawke, *supra* note 33, at 831. "[H]olding municipalities accountable for the unconstitutional acts of one of its officials remains difficult in actions for damages." *Id.*

[76] *Id.* at 845.

[77] One commentator has described the stringency of the municipal liability standard as follows:

> Th[e] conglomeration of [municipal liability] standards is idiosyncratically protective of the municipal pocketbook. It is higher than the ordinary standard for private employer liability, higher than the standard for municipal liability for non-constitutional torts, and higher than the standard for individual liability for negligent selection of independent contractors. Remarkably, the standard for awarding compensatory damages against cities under § 1983 is even higher than the standard for awarding punitive damages against pri-

impossible under § 1983. For instance, formally promulgated policies authorizing unconstitutional SWAT team conduct rarely exist.[78] Customs are equally difficult to establish as SWAT practices employed in field operations are driven by highly fact-specific variables.[79] Satisfying the deliberate indifference standard required for imposing training-based liability is no less challenging given the difficulties encountered in establishing causation.[80] The slim possibility of recovering against a municipality under § 1983 has prompted one scholar to conclude that the current approach to municipal liability "favors those committing the wrong, instead of those seeking redress for violations of their rights."[81] Given these considerations, the § 1983 cause of action against municipalities represents a grossly inadequate remedy for SWAT-victim plaintiffs seeking compensatory damages in the wake of unconstitutional wrong-premises SWAT raids.

> vate employers. [The Supreme Court has] confine[d] entity liability in a manner that is unique to § 1983 and exists in no other area of the law.

Achtenberg, *supra* note 61, at 2191.

[78] *See* Schwartz, *supra* note 33, at 548.

[79] Singh, *supra* note 36, at 715. Establishing the permanent and well-settled nature of SWAT practices is extremely difficult for this reason. For instance, the SWAT technique of using a tow truck to pull a door off a house may not be used on every single occasion that a SWAT team conducts a raid. This undermines any contention that such a technique is sufficiently permanent to constitute a "custom" under the current standard articulated in *Monell*. *Id.* Any effort to prove custom-based liability is also likely to entail a great deal of investigation and time-consuming, often cost-prohibitive discovery. Schwartz, *supra* note 33, at 548.

[80] Schwartz, *supra* note 33, at 550. Speaking of police misconduct claims in general, the author notes his "observation . . . that although [training-based liability] claims are asserted fairly routinely, relatively few succeed. It is a tiny fraction." *Id.* Moreover, by ensuring that they have in place a constitutionally-sound SWAT training program, municipalities can effectively immunize themselves from § 1983 liability, regardless of whether officers adhere to such training on a given SWAT mission. Singh, *supra* note 36, at 714.

[81] Hawke, *supra* note 33, at 850. An empirical study involving a survey of city attorneys around the country revealed city attorneys' satisfaction with the barriers plaintiffs face in raising claims against municipalities. *Id.* at 849. Several city attorneys commented that the high, confusing standard for imposing municipal liability frequently permits municipalities to prevail on summary judgment or directed verdict. *Id.* at 850. One city attorney went as far as to remark that such claims are "always dismissed under *Monell*." *Id.* at 849.

B. State Law: Common Law Tort Claims (Mississippi Tort Claims Act)

In light of the limited possibility of recovery under federal law, SWAT-victim plaintiffs may opt to bring state common law tort claims in lieu of or supplementary to constitutional tort claims. In Mississippi, common law tort claims against individual police officers or municipalities are governed by the Mississippi Tort Claims Act ("MTCA").[82] As will be seen, SWAT-victim plaintiffs suing under the MTCA face substantial barriers to recovery as well.

In short, the MTCA waives immunity of the state and its political subdivisions for their torts and the torts of their employees provided such employees were acting within the course and scope of their employment.[83] The Mississippi legislature established the MTCA as the exclusive remedy against governmental entities and their employees.[84] Such employees cannot be held personally liable for conduct occurring in the course and scope of their employment.[85] Thus, a SWAT-victim plaintiff suing under the MTCA will recover, if at all, from the governmental entity, regardless of the named defendants.

In an effort to limit the expansiveness of the waiver of immunity set out in the MTCA, the Mississippi legislature provided for a number of exemptions from liability, two of which are relevant to actions brought by SWAT-victim plaintiffs: (1) the police activity exemption[86] and (2) the discretionary function exemption.[87]

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[82] MISS. CODE ANN. §§ 11-46-1 to 11-46-23 (1972).

[83] § 11-46-5(1). "[I]t shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment." *Id.* § 11-46-5(3).

[84] § 11-46-7. "The remedy provided by [the MTCA] against a governmental entity or its employee is exclusive of any other civil action . . . by reason of the same subject matter against the governmental entity or its employee or the estate of the employee . . . ." *Id.* § 11-46-7(1).

[85] *Id.* § 11-46-7(2). Additionally, the MTCA requires that every governmental entity (1) provide its employees with a defense to claims brought under the MTCA and (2) be responsible for the payment of any judgment or settlement arising from any claim brought against the employee under the MTCA. *Id.* § 11-46-7(3). The duty of governmental entities to defend and indemnify employees is secondary to the obligations of any insurer. *Id.*

[86] § 11-46-9(1)(c). This subsection provides the following:

To recover under the MTCA, the SWAT-victim plaintiff must overcome the police activity exemption. This exemption requires the SWAT-victim plaintiff to prove by a preponderance of the evidence[88] that the defendant officer(s) and/or municipality acted "in *reckless disregard*"[89] of the SWAT-victim plaintiff's "safety and well-being."[90] The Mississippi Supreme Court has defined "reckless disregard" as "a higher standard than gross negligence . . . embrac[ing] willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act."[91] The Court has characterized "reckless disregard" as being "just a step below *specific intent*."[92] Mere *negligence* triggers immunity in this context.[93] A showing of *malice* on the part of

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> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
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> . . .
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> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection *unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury.*

Id. (emphasis added).

[87] *Id.* § 11-46-9(1)(d). This subsection provides the following:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
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> . . .
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> (d) Based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Id. (emphasis added).

[88] Simpson v. City of Pickens, 761 So. 2d 855, 859 (Miss. 2000).

[89] § 11-46-9(1)(c) (emphasis added).

[90] *Id.* In discussing the purpose of the police activity exemption, the Mississippi Supreme Court has acknowledged that police officers face exposure to dangerous situations and potential liability as a matter of course. Thus, public policy requires that police officers enjoy immunity from liability for "mere negligence." Maldonado v. Kelly, 768 So. 2d 906, 909 (Miss. 2000).

[91] City of Jackson v. Powell, 917 So. 2d 59, 71 (Miss. 2005). *See also Maldonado*, 768 So. 2d at 911 (noting that for conduct to be demonstrative of "reckless disregard," it must "evince[] not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved").

[92] City of Jackson v. Lipsey, 834 So. 2d 687, 692 (Miss. 2003) (emphasis added).

[93] *Id.* "[I]mmunity lies for negligence." *Id.*

the governmental entity's employee(s) likewise falls outside the scope of MTCA liability.[94]

In addition to proving that individual officers and/or the municipality acted with reckless disregard, the SWAT-victim plaintiff must defeat any assertion of the discretionary function exemption. Under this exemption, the MTCA defendant is immune from liability for claims based upon the performance of a "discretionary function."[95] The Mississippi Supreme Court has adopted a two-part test to determine if a function is discretionary: (1) the activity must involve an element of choice or judgment *and* (2) the choice or judgment must involve social, economic, or political alternatives.[96] If the claim is found to arise from a discretionary function, immunity will attach and the SWAT-victim plaintiff cannot recover.[97] On the other hand, if the action complained of is deemed a ministerial (as opposed to a discretionary) function, immunity will not attach under this exemption, and recovery is possible (provided the SWAT-victim plaintiff can overcome the police activity exemption discussed *supra*).[98]

SWAT-victim plaintiffs suing under the MTCA face considerable obstacles to recovery. The major obstacle lies in proving that individual officers or the municipality acted with reckless disregard in obtaining or executing the warrant that resulted in the wrong-premises raid. For one thing, a showing of mere negligence on the part of anyone involved is of no import whatsoever in establishing liability.[99] Recovery will likewise be barred in the event any SWAT officers are found to have acted with

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[94] §§ 11-46-5(2) to 11-46-7(2). *See Powell*, 917 So. 2d at 73 (holding that the City of Jackson was immune from liability under the MTCA for the actions of two officers whom the trial court found acted with malice).

[95] § 11-46-9(1)(d).

[96] *Powell*, 917 So. 2d at 73. If the obligation is imposed by law, leaving no room for judgment, then it will be deemed ministerial, and immunity will not attach. *Id.* The discretionary function exemption may apply to actions of a governmental entity itself as well as to the actions of its employees. *Id.*

[97] *See id.*

[98] *See id.*

[99] *See supra* note 93 and accompanying text. For an illustration of this principle in application in the context of an arrest warrant, see *City of Greenville v. Jones*, 925 So. 2d 106 (Miss. 2006).

malice in the execution of the raid.[100] Given established precedent, SWAT officers found to have executed a warrant valid on its face (albeit incorrectly describing the target) will almost certainly not be held to have acted with reckless disregard.[101] Moreover, even if the officer who obtained the warrant is found to have acted with reckless disregard, immunity will very likely attach under the discretionary function exemption.[102] SWAT-victim plaintiffs suing for property damage alone will also be barred from recovery under the MTCA given the Mississippi Supreme Court's literal interpretation of the police activity exemption.[103] These barriers to recovery, coupled with the MTCA's restrictive damage caps[104] and bench trial requirement,[105] render Mississippi state common law tort claims, like their federal constitutional counterparts, a hollow remedy for victims of wrong-premises SWAT raids.

III. PAVING A ROAD TO BROADER REMEDIES FOR SWAT-VICTIM PLAINTIFFS

As discussed in the previous sections of this comment, the realities of wrong-premises SWAT litigation entail substantial barriers to recovery of compensatory damages. A SWAT-victim plaintiff suing under § 1983 may confront a scenario in which individual SWAT and/or police officers conclusively violated the

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[100] *See supra* note 94 and accompanying text.

[101] *See* Foster v. Noel, 715 So. 2d 174, 179 (Miss. 1998) (holding that while the officer who filled out the arrest warrant acted with reckless disregard under the MTCA, the officer who executed the warrant, valid on its face, conclusively did *not*).

[102] *See* Barrett v. Miller, 599 So. 2d 559, 567-68 (Miss. 1992). In this pre-MTCA case, the Mississippi Supreme Court held that officers involved in obtaining search warrants perform a discretionary function while officers who execute such warrants perform a ministerial function. *Id.* While no MTCA case appears to have addressed this precise issue, it may be presumed absent any indication to the contrary that the Mississippi Supreme Court would adhere to this characterization in resolving the identical issue under the MTCA framework.

[103] Lee County v. Davis, 838 So. 2d 243, 245-46 (Miss. 2003) (holding that "[i]f the Legislature intends to include property damage [for actions brought under the "reckless disregard" exception to MISS. CODE ANN. § 11-46-9(1)(c)] an amendment would be necessary").

[104] MISS. CODE ANN. § 11-46-15 (1972). The legislature has capped monetary damages for all claims arising out of a single occurrence at $500,000. *Id.* § 11-46-15(1)(c). Furthermore, punitive damages are prohibited under the MTCA. *Id.* § 11-46-15(2).

[105] § 11-46-13(1). Claims arising under the MTCA *shall not* be tried to a jury. *Id.*

plaintiff's Fourth Amendment rights yet successfully invoke qualified immunity, thus avoiding the suit altogether.[106] Forced then to look to the municipality for redress, the SWAT-victim plaintiff may very well find that the constitutional violation did not stem from the municipality's *own* actions but was predicated *solely* on the actions of individual officers. The SWAT-victim plaintiff facing such a scenario[107] is consequently left remediless under federal law and must turn to state law for relief.

In Mississippi, the SWAT-victim plaintiff seeking compensatory damages will be required to prove that officers acted with "reckless disregard" in raiding the wrong premises.[108] State law will effectively bar recovery for *any* wrong-premises raid resulting from *negligence* as well as any conduct of SWAT officers deemed "malic[ious]."[109] Therefore, under current law, many SWAT-victim plaintiffs will be left entirely without legal redress notwithstanding the grave injuries to persons and property—and in the most unfortunate cases, the loss of human life—visited upon them by their own local governments. The law cannot permit this state of affairs to stand unaddressed. Statutory reform is crucial to ensure that SWAT-victim plaintiffs are not left to shoulder the burden of such egregious injuries absent appropriate compensation from the government that inflicted them.

A. A Federal SWAT-Victims' Relief Statute

In light of the remedial shortfalls of § 1983 in the context of wrong-premises SWAT litigation, Congress should enact a statute rendering municipalities *vicariously liable* for damages incurred by innocent victims of wrong-premises SWAT raids. This statute should subject municipalities to the well-known principles of vicarious liability espoused by the doctrine of respondeat superior—the same common law tort principles that govern

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[106] *See supra* Part II.A.

[107] In a slightly different scenario, the court may conclude that no constitutional violation occurred at all, even despite the occurrence of the wrong-premises raid. *See infra* note 127 and accompanying text. In this scenario as well, the SWAT-victim plaintiff would be compelled to rely on state law for recovery.

[108] *See supra* notes 86, 89 and accompanying text.

[109] *See supra* notes 93-94 and accompanying text.

other employer-employee relationships. That is, this statute should impose vicarious liability on municipalities for damages arising from wrong-premises SWAT raids conducted by municipal employees, raids which the statute should define by default as being performed in the course and scope of employment. Congress is constitutionally authorized to enact such a statute by virtue of its Section Five enforcement power,[110] indeed the very power upon which Congress predicated its enactment of § 1983.[111]

As a principal argument for the enactment of such a statute, it is critical that Congress act to bridge the gap that currently precludes recovery for constitutional violations committed by individual SWAT/police officers in cases where the municipality bears no direct fault. As discussed above, when fault for the constitutional violation lies with the individual officers involved in planning and executing the wrong-premises raid, those officers will be immune from suit provided they are found, even at the very *earliest* stages of litigation, to have acted reasonably under the circumstances.[112] In those situations where the constitutional violation was predicated *solely* on the actions of individual officers—that is, where the violation was *not* attributable to the municipality's *own* actions—the SWAT-victim plaintiff stands remediless under current federal law.[113] The proposed statute would rectify this inequitable result by permitting SWAT-victim plaintiffs to recover from the municipality in this scenario under the well-established tort doctrine of respondeat superior.[114]

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[110] *See* U.S. CONST. amend. XIV, § 5; City of Boerne v. Flores, 521 U.S. 507, 517-20 (1997).

[111] Quern v. Jordan, 440 U.S. 332, 351 n.3 (1979) (Brennan, J., concurring) (observing that "[t]here is no question but that § 1983 was enacted by Congress under § 5 of the Fourteenth Amendment"). *See* 2 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14:79 (3d ed. 2007).

[112] *See supra* notes 44-45 and accompanying text.

[113] *See supra* Part II.A.

[114] Both (1) United States Supreme Court precedent interpreting municipal liability in the context of § 1983 and (2) established agency law principles strongly support the contention that the qualified immunity enjoyed by tortfeasor-employees (in the constitutional and traditional tort contexts, respectively) should *not* likewise apply to the employing municipality. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that the municipality may not assert the immunity of its employees as a defense to

The proposed statute would further benefit SWAT-victim plaintiffs by providing them with a fairer chance of obtaining a collectible judgment given the relatively deeper pockets of municipalities.[115] This elevated probability of obtaining meaningful compensatory relief is meritorious in its own right given the grave deprivations frequently experienced by SWAT-victim plaintiffs. The prospect of greater compensation will also function to deter future wrong-premises SWAT raids. The deterrent effect of increased prospects for compensation is two-fold: (1) the increased exposure to liability will create an added incentive for municipalities to take appropriate preventive measures with regard to SWAT policies and procedures (i.e., to minimize the risk of future wrong-premises raids) and (2) this incentive will be augmented by the larger number of SWAT-victim plaintiffs likely to bring suit in the face of a more favorable likelihood of recovery.[116]

Rounding out the argument for the proposed statute are the traditional fairness arguments typically offered in support of respondeat superior in the employer-employee context, arguments which resonate with equal validity in the context of wrong-premises SWAT litigation.

First is the argument that the municipality, as the beneficiary of its SWAT team's constitutionally *valid* actions, should in fairness stand to bear the costs of its constitutionally *invalid* actions.[117] The municipality enjoys the purported benefits of constitutional SWAT operations: readiness to handle hostage crises and terror threats, increased apprehension rates of dangerous felons, etc. Thus, it is only fair that the municipality should bear the costs that have unfortunately accompanied the beneficial aspects of SWAT operations.

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liability under § 1983); RESTATEMENT (SECOND) OF AGENCY § 217(b)(ii) (1958) (stating that "[t]he principal has no defense because of the fact that . . . the agent had immunity from civil liability as to the act").

[115] "[M]unicipalities are more likely to have sufficient reachable assets than individual officials." Beermann, *supra* note 60, at 646 (discussing reasons favoring an interpretation of § 1983 as permitting vicarious municipal liability).

[116] *See id.*

[117] *See id.*; 27 AM. JUR. 2D *Employment Relationship* § 374 (2007).

Secondly, as the benefits of constitutional SWAT operations accrue to the community as a whole, it is entirely fair that the losses incurred by innocent victims of unconstitutional wrong-premises raids should be spread out over the municipality's tax base.[118] It is fundamentally inequitable in a constitutional democracy that innocent victims of such raids should be expected to shoulder the resulting financial burdens. When a SWAT team acts unconstitutionally to invade an innocent citizen's home, terrorize its inhabitants, and inflict needless injuries to persons and property, the taxpayers—not the innocent victims—should ultimately foot the bill.

A final traditional argument supporting respondeat superior and having relevance in the SWAT litigation context is the greater ability of the municipality, vis-à-vis individual SWAT officers, to pay damage awards.[119] As alluded to above, the individual SWAT officer to whom qualified immunity does not attach may have insufficient assets to satisfy any judgment taken against him. Since the constitutional violation occurs in the course and scope of the officer's employment, i.e., while he is acting as an agent of the municipality, it is inherently fair that the municipality should pay the damages arising out of the officer's unconstitutional conduct.

Critics of the proposed statute will object to the increased liability exposure municipalities would face under such a statute. Opponents will resist saddling municipalities with the associated costs of defending actions brought under the statute and paying damage awards in the wake of verdicts favoring SWAT-victim plaintiffs. Admittedly, the proposed statute will place greater financial burdens on municipalities made defendants under the statute. However, this heightened exposure to liability is warranted as it is the mechanism that will effectuate the statute's deterrent function. Unless and until municipalities feel the effect of SWAT-victim plaintiffs' actions in the municipal pocketbook, little additional incentive will exist to take more proactive measures to prevent wrong-premises SWAT

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[118] *See* Beermann, *supra* note 60, at 646 (discussing reasons favoring an interpretation of § 1983 as permitting vicarious municipal liability).

[119] *Id.*; 27 AM. JUR. 2D *Employment Relationship* § 374 (2004).

raids in the future.[120] Other critics of the proposed statute may, upon a cursory reading of the Supreme Court's opinion in *Monell v. Department of Social Services*,[121] contend that Congress lacks the constitutional authority to enact a statute imposing vicarious liability on municipalities for constitutional violations perpetrated by their employees. In *Monell*, the Court concluded that municipalities cannot be held vicariously liable for the actions of their employees under § 1983.[122] As partial support for this conclusion, the Court cited "constitutional problems" which it determined the enacting Congress had with the notion of respondeat superior as applied to municipalities in constitutional tort actions.[123] Though the Court has never expressly disclaimed this determination in a subsequent majority opinion, it has been thoroughly repudiated by contemporary commentators as stemming from the Court's erroneous interpretation of the legislative history surrounding § 1983's enactment.[124] In fact, several Supreme Court Justices have joined commentators in calling for the Court to rethink its interpretation of § 1983 with an eye toward permitting vicarious municipal liability under the *current* version of the statute.[125] Thus, any objection to the proposed statute on constitutional grounds rings decidedly hollow.

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[120] Moreover, as discussed above, it is only fair that the losses sustained by individual SWAT-victim plaintiffs ultimately be spread among the taxpayers who enjoy the purported benefits of constitutional SWAT activity. *See supra* notes 117-18 and accompanying text.

[121] Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[122] *Id.* at 691.

[123] *Id.* at 693.

[124] An examination and critique of the *Monell* Court's reading of the legislative history and the Court's resultant reasoning is well beyond the scope of this comment. Indeed, the topic has been discussed at length by various scholarly commentators. *See, e.g.*, Achtenberg, *supra* note 61, at 2196-217. "The Court's . . . argument . . . that . . . [the enacting] Congress would have found . . . respondeat superior . . . constitutionally objectionable [ ] has been thoroughly refuted . . . ." *Id.* at 2210. *See also* Beermann, *supra* note 60, at 627-51.

[125] Justice Stevens has consistently argued for vicarious municipal liability under § 1983. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 489 (1986) (Stevens, J., dissenting); City of Oklahoma City v. Tuttle, 471 U.S. 808, 835-40 (1985) (Stevens, J., dissenting). *See also* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 430-32 (1997) (Breyer, Stevens, & Ginsburg, JJ., dissenting). For well-developed examples of such arguments as presented by scholarly commentators, see Achtenberg, *supra* note 61, and Beermann, *supra* note 60.

The proposed statute will alleviate some of the barriers to recovery for SWAT-victim plaintiffs suing for constitutional violations. However, it will do nothing to aid the recovery of SWAT-victim plaintiffs unable to prove that a constitutional violation occurred in the planning and/or execution of the wrong-premises raid. In that regard, Congress's hands are likely tied,[126] for the Supreme Court has consistently held that "[t]he Fourth Amendment is *not* violated . . . by the mistaken execution of a valid search warrant on the wrong premises."[127] Consequently, SWAT-victim plaintiffs who cannot prove the requisite constitutional violation must recover under state law if they are to recover at all.

B. An Amendment to the MTCA

The Mississippi legislature should amend the MTCA to provide a narrowly defined strict liability cause of action against municipalities for damages stemming from wrong-premises SWAT raids. This amendment should provide SWAT-victim plaintiffs with a viable strict liability cause of action regardless of whether a given raid would be deemed to entail a constitutional violation under federal law. Furthermore, in delineating the strict liability aspect of the proposed cause of action, this amendment should expressly override both the police activity exemption and the discretionary function exemption in the context of wrong-premises SWAT litigation. Finally, the amendment should include a provision permitting recovery of property damages in addition to damages currently allowed in MTCA police activity cases.

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[126] In exercising its Section Five enforcement powers, Congress is empowered to enact legislation that "deters or remedies constitutional violations . . . ." City of Boerne v. Flores, 521 U.S. 507, 518 (1997). Congress does "not [have] the power to determine what constitutes a constitutional violation." *Id.* at 519. Thus, Congress probably does not have the power under Section Five to legislate with respect to raids that do not entail constitutional (i.e., Fourth Amendment) violations as defined by the Supreme Court. *See infra* note 127 and accompanying text. Consequently, the application of the proposed federal statute will necessarily be restricted to instances in which a constitutional violation has conclusively occurred.

[127] Graham v. Connor, 490 U.S. 386, 396 (1989) (emphasis added). *See also* Maryland v. Garrison, 480 U.S. 79 (1987).

As a primary argument for the proposed amendment, it would provide a state-law compensatory vehicle for SWAT-victim plaintiffs damaged by wrong-premises raids caused by mere *negligence*. The amendment will ensure that SWAT-victim plaintiffs are not summarily denied recovery under state law purely because the offending officers' conduct did not rise to the level of reckless disregard.[128] Nor will SWAT-victim plaintiffs continue to stand remediless in situations where SWAT officers are subsequently deemed to have acted with *malice* in the execution of the wrong-premises raid.[129] The amendment will also ensure that recovery will not be barred when the culpable conduct lies exclusively with the officer who obtained the warrant[130] or when the only damages sustained in the raid are property damages.[131]

The proposed amendment goes further, however. In subjecting municipalities to strict liability for wrong-premises SWAT raids, the amendment will guarantee compensation to *all* SWAT-victim plaintiffs who succeed in proving that the damages of which they complain were proximately caused by the wrong-premises SWAT raid. From a moral and equitable standpoint, the level of civil culpability demonstrated by the municipality or its employees should not figure into the calculus. When the peace and tranquility of the innocent citizen's home is violated, its physical structure affronted, and its inhabitants subjected to humiliating treatment, physical injury, or worse, it stands as an unconscionable proposition that state law should require the aggrieved citizen to prove anything beyond causation to recover from the party which is ultimately responsible for the whole unfortunate affair: *the municipality*. The proposed amendment will function to that end.

Critics of the proposed amendment will object to burdening municipalities with the increased costs of damage awards flowing from plaintiffs' verdicts under the proposed amendment. The counterargument to this criticism is two-fold: (1) the pros-

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[128] *See supra* notes 89-93 and accompanying text.
[129] *See supra* note 94 and accompanying text.
[130] *See supra* note 102 and accompanying text.
[131] *See supra* note 103 and accompanying text.

pect of increased costs, coupled with pressure from municipal insurers and voting taxpayers, will serve a deterrent function spurring municipalities to take more proactive steps to prevent wrong-premises raids in the future[132] and (2) from an equitable standpoint, it is fairer that the losses sustained by SWAT-victim plaintiffs be spread among the community's taxpayers than that they be shouldered exclusively by the innocent victims.[133]

Opponents of the proposed amendment will also attack its moral/equitable justification for the imposition of strict liability, arguing that such grounds alone are insufficient to warrant saddling municipalities with strict liability in this context. The response to this argument is that traditional tort law provides ample justification for imposing strict liability on municipalities for damages flowing from wrong-premises SWAT raids: a viable argument can be made that dynamic-entry SWAT raids constitute an *abnormally dangerous activity*, for which tort law has long recognized the imposition of strict liability.[134] Admittedly,

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[132] *See supra* note 116 and accompanying text.

[133] *See supra* note 118 and accompanying text.

[134] *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977). Section 519 states, in pertinent part:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Id. § 519. Section 520 outlines factors to be considered in determining whether an activity is "abnormally dangerous":

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on;
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520. While all of these factors are to be considered, none alone is either necessary or sufficient, but generally several are required for strict liability to apply. *Id.* § 520 cmt.

tort law has *not* traditionally permitted strict liability in the context of abnormally dangerous activities carried on in pursuance of a public duty.[135] Nevertheless, the underlying policy justifications remain valid despite the addition of the public duty element. Moreover, the legislature is free to impose strict liability notwithstanding the common law's exception for activities stemming from public duties.

IV. CONCLUSION

Wrong-premises SWAT raids pose a particularly dangerous threat to American society. Not only do they needlessly inflict grave and sometimes fatal injuries on innocent citizens, but they also affront our very American notions of liberty, private property, the sanctity of the home, and the right to be left alone. The ongoing "War on Drugs" coupled with the current "War on Terror" will inevitably propel the use of SWAT-style incursions well into the foreseeable future. And the Supreme Court's recent decision in *Hudson v. Michigan*,[136] in which the Court held that the violation of the knock-and-announce rule does not mandate the suppression of all evidence generated by the search, will arguably lead to even *more* widespread use of (real or de facto) no-knock search warrants in the future.

All of these factors point to a probable escalation in the frequency of wrong-premises SWAT raids in the short-run. These are not isolated incidents, and the tragedy of wrong-premises SWAT raids has already struck too close to home—literally—for many around the country. Congress and state legislatures should not sit idly by and wait for the courts to graft judicially implied remedial provisions into existing statutory schemes. SWAT-victim plaintiffs must be afforded a fair and just avenue to recovering compensation for their damages. Furthermore, municipalities must be held legally, and thereby *financially*, responsible for the damages they inflict, however directly or indirectly, on the very citizens they exist to serve. Deterrence can

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[135] *See* RESTATEMENT (SECOND) OF TORTS § 521 (1977). "The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee . . . ." *Id.*

[136] Hudson v. Michigan, 126 S. Ct. 2159 (2006).

only be predicated on fiscal ramifications for the governmental entities calling the shots in the first place. While the proposals outlined in this comment are by no means held out to be panaceas to these ends, they are a step in the right direction.

Rex M. Shannon III

RECENT DECISION

Constitutional Law—Taxpayer Standing to Challenge Executive Spending—Discretionary Spending versus Spending Pursuant to Congressional Authority

I. FACTS

In 2001, President George W. Bush created by executive order a White House Office, within the Executive Office of the President, charged with ensuring that private and charitable organizations, including religious groups, had the opportunity to compete for federal financial assistance on a level playing field.[1] The office was primarily charged with the elimination of unnecessary, bureaucratic "red tape" that could potentially impede such organizations from furthering their missions with federal assistance.[2]

By separate executive orders, the President created Executive Department Centers for Faith-Based and Community Initiatives within individual agencies and departments.[3] Traditionally, the federal government has been unwilling to cooperate with faith-based and community groups.[4] President Bush's initiative sought to reverse this practice by enabling the use of federal moneys to fund conferences and events sponsored by these groups.[5]

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[1] Exec. Orders No. 13,198, 13,199, 66 Fed. Reg. 8497, 8499 (Jan. 31, 2001); Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2560 (2007).

[2] *Id.* Congress did not specifically authorize these entities, nor has Congress enacted any law specifically appropriating money to further the initiatives set forth by such entities. The entities are solely funded through the executive branch budget.

[3] Exec. Order No. 13,198, 66 Fed. Reg. 8497; *see also,* Exec. Order No. 13,279, 67 Fed. Reg. 77141 (2002). The agency was charged with the coordination of outreach efforts to distribute information to the faith-based and community organizations. *Id.*

[4] *See* Bradley Thomas Wilders, Note, *Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?*, 71 MO. L. REV. 1199 (2006).

[5] *Id.*

Respondent Freedom from Religion Foundation ("FFRF") brought suit in the United States District Court for the Western District of Wisconsin against directors of the faith-based and community initiatives centers, alleging that the use of federal funds to host conferences promoting such initiatives violated the Establishment Clause.[6] Seeking an injunction, FFRF asserted standing as federal taxpayers opposed to the use of tax dollars to further religious agendas.[7] The district court dismissed the action for lack of standing.[8]

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the dismissal, finding instead that FFRF did in fact have taxpayer standing.[9] The court reasoned that FFRF could "challenge anything done by a federal agency or office so long as 'the marginal or incremental cost to the taxpaying public of the alleged violation of the Establishment Clause' is greater than 'zero.'"[10] In an attempt to resolve the "taxpayer standing" question, the United States Supreme Court granted certiorari to petitioner Jay Hein (Director of the White House Office of Faith-Based and Community initiatives) and held: reversed.[11] As a general rule, taxpayers have standing to challenge executive spending in only exceptional circumstances; here, because FFRF challenged executive spending that was discretionary, and not specifically authorized by Congress, FFRF did not have standing under *Flast*'s very narrow exception to the general rule that taxpayers do not have sufficient injury to constitute Article III standing injury.[12]

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[6] *Hein*, 127 S. Ct. at 2560-61. FFRF alleged the government violated the Establishment Clause by using executive branch appropriations, designated for use by the executive branch by Congress, to promote religious community groups over secular ones. *Id.*

[7] *Id.* at 2561.

[8] *Id.* The district court relied on the doctrine articulated in *Flast v. Cohen* which limited federal taxpayer standing to only those challenges contesting the constitutionality of exercises of congressional power under the Taxing and Spending Clause of Article I, Section 8. Flast v. Cohen, 392 U.S. 83 (1968). In *Hein*, FFRF challenged a program carried out by the executive branch, using executive branch discretionary funds, and not a program created by Congress.

[9] *Hein*, 127 S. Ct. at 2561 (citing Freedom From Religion Found., Inc. v. Chao, 433 F.3d. 989 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007)).

[10] *Hein*, 127 S. Ct. at 2561 (quoting *Chao*, 433 F.3d at 995).

[11] *Id.* at 2559.

[12] *Id.* at 2568.

II. Related Law

Article III of the Constitution defines the scope of judicial power in the United States[13] and limits federal court jurisdiction to "cases" and "controversies."[14] One important element to consider when determining whether a dispute meets the Constitution's case or controversy requirement is whether the party has the requisite standing to raise the matter for adjudication.[15] The Supreme Court has held that Article III standing requires an injury in fact, causation, and redressability.[16] The constitutional doctrine of separation of powers, requiring respect be owed to one branch of government from another, creates a need for the "standing" doctrine. For example, citizens have the opportunity to elect representatives who will designate their tax dollars as they see fit. The standing doctrine holds that the federal judiciary, therefore, should not be involved in such disagreements between the people and their elected representatives. The general "standing" requirement has frequently been addressed throughout judicial history. One smaller facet of the standing doctrine, taxpayer standing, continues to present issues, as well as inconsistent holdings, in cases of alleged Establishment Clause violations.

A. The Court's General Rule on Taxpayer Standing

The Supreme Court addressed taxpayer standing for the first time in *Frothingham v. Mellon*.[17] The federal taxpayer in *Frothingham* challenged an act that appropriated funds for mothers' and children's health, arguing that involvement in this

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[13] *See* U.S. Const. art. III, § I

[14] *Hein*, 127 S. Ct. at 2562 (citing DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1861 (2006)).

[15] ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989); *see also* Baker v. Carr, 369 U.S. 186, 204 (1962) (explaining that the main inquiry into the question of standing is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

[16] *See* Allen v. Wright, 468 U.S. 737, 751 (1984).

[17] 262 U.S. 447 (1923). *Frothingham* was decided with *Massachusetts v. Mellon*. *Id.* It is most commonly cited as *Frothingham v. Mellon*.

area would "increase the burden of future taxation" and consequently "take [the plaintiff's] property without due process of law."[18] The Court promulgated the general rule holding that this type of taxpayer interest is "too generalized and attenuated to support Article III standing."[19] Reasoning that the plaintiff's interests and injuries were shared by millions, the Court concluded that there was no particularized or traceable injury.[20]

Frothingham illustrated the Court's disdain for the notion that federal courts should be open to individual plaintiffs who claim to suffer injuries shared by the general public.[21] Simply put, the Court did not believe that federal taxpayers were personally injured in such a manner that warranted judicial intervention in light of Article III's case or controversy requirement.[22] For nearly half a century, *Frothingham*'s general prohibition on taxpayer standing remained the rule, and several subsequent decisions have likewise denied taxpayer standing.[23] In light of these cases, *Flast v. Cohen*,[24] which articulated an exception to the general rule, was seen as the anomaly.[25]

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[18] *Id.* at 486.

[19] *Hein*, 127 S. Ct. at 2563.

[20] *Frothingham*, 262 U.S. at 487. The Court further argued that the interests of federal taxpayers are, in essence, interests of the public-at-large. *Id.* at 489. Clarifying its position, the Court explained its concern for separation of powers. *Id.* The Court stated that if it were to decide a judicial controversy, based solely on taxpayer standing, it would in essence be assuming "a position of authority over the governmental acts of another and coequal department." *Id.*; *see also* Ala. Power Co. v. Ickes, 302 U.S. 464, 478-79 (1938).

[21] Wilders, *supra* note 4, at 1200.

[22] *Frothingham*, 262 U.S. at 488-89. "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Id.* at 488.

[23] *See* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1862 (2006) (confirming that the injury must be concrete and particularized and that taxpayer injury is too common); United States v. Richardson, 418 U.S. 166 (1974) (explaining that a taxpayer may not employ a federal court to hear their "general grievance" about the allocation of government funds); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974) (denying taxpayer standing to plaintiff challenging the constitutionality of Congressmen simultaneously serving in the Armed Services).

[24] 392 U.S. 83 (1968)

[25] Wilders, *supra* note 4, at 1200.

B. The Narrow Exception to the General Rule: Two-Part Taxpayer Standing Test

Forty-five years after the *Frothingham* decision, the Court acknowledged taxpayer standing in *Flast v. Cohen*.[26] The *Flast* plaintiffs sought to enjoin government expenditures, pursuant to a congressional mandate, of federal funds in the purchase of academic resources for religious schools; the plaintiffs claimed that such expenditures were unconstitutional under the Establishment and Free Exercise clauses of the First Amendment.[27] The Court ruled the taxpayers had standing to challenge the expenditures, thereby indicating an interest in reevaluating *Frothingham*'s stringent rule.[28]

The Court first explained that although the decision in *Frothingham* had never been overruled, it had frequently been the source of confusion and "considerable criticism"[29] and a need therefore existed for its reevaluation. The Court analyzed the practical functions served by the standing limitations outlined in *Frothingham*, noting that if an individual could never challenge government expenditures, congressional and executive spending would be unbridled.[30] The Court interpreted its earlier decision in *Frothingham* as a broad limitation on taxpayer suits, but not a complete bar.[31] The Court further argued that judicial power must be involved under some circumstances where taxpayers bring challenges against unconstitutional appropriations.[32]

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[26] *Flast*, 392 U.S. at 85-86.

[27] *Id.* at 102-04.

[28] *Id.* at 106.

[29] *Id.* at 92. Much of the confusion stems from the ever-changing policy considerations found within the justiciability doctrine. *Id* at 97. The Court describes the justiciability doctrine as one of "uncertain and shifting contours." *Id.*

[30] *Id.* at 94. The Court suggests that one possible factor underlying the denial of standing in *Frothingham* was that the petitioner's tax bill was not of a significant amount. *Id.* at 97. With the increased reliance on revenue derived from the income tax, coupled with changes in the tax code, many taxpayers may be able to make the case that their injury is in fact substantial. *Id.* Conversely, the Court pointed out that the fear expressed in *Frothingham* that "allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure, adopted subsequent to *Frothingham*." *Id.* at 94.

[31] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003).

[32] *Flast*, 392 U.S. at 112-13 (Douglas, J., concurring).

To determine the circumstances under which a federal taxpayer is deemed to have standing consistent with the constitutional limitations of Article III, the Court dictated a two-part test, of which both parts must be met in order to establish a "nexus between the status asserted by the litigant and the claim he presents."[33] The party must (1) assert the "status of [a] federal taxpayer[]" and "challenge the constitutionality of a federal spending program" under specifically the Taxing and Spending Clause.[34] The taxpayer must establish a logical link between her status as a taxpayer and the type of legislative enactment she attacks.[35] Thus, *Flast*'s taxpayers had standing to challenge exercises of congressional power under the Taxing and Spending Clause of the Constitution because they challenged a congressional authorization to spend for the general welfare.[36] But, the taxpayer must also (2) establish a nexus between her status as a taxpayer and the precise nature of the constitutional infringement alleged, showing that "the challenged enactment exceeds specific constitutional limitations" on the exercise of congressional power under the Taxing and Spending Clause.[37] In *Flast*, the Taxing and Spending Clause formed the necessary nexus between the taxpayers, as plaintiffs, and the injury alleged.

Since its decision, however, the Court has referred to *Flast*'s holding as a narrow exception to the general rule. Lower courts have likewise treated *Flast* as a case confined to its facts.[38]

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[33] *Id.* at 102.

[34] *Id.*

[35] *Id.*

[36] *Id.* The Justices distinguished *Frothingham* by explaining that although the enactment challenged was adopted by Congress pursuant to its taxing and spending powers, the plaintiff alleged the act violated the Fifth and Tenth Amendments, neither of which were passed to limit Congress's ability to tax and spend. Staudt, *supra* note 31, at 771. Further, the Establishment Clause was clearly enacted with the purpose of restraining legislators from using taxpayer money to favor religion. *Id.*

[37] *Flast*, 392 U.S. at 102-03.

[38] Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2568-69 (2007).

C. Taxpayers Must Challenge Specific Congressional Actions or Mandates

In *Valley Forge Christian College v. Americans United for a Separation of Church and State*,[39] the plaintiffs challenged the transfers, free of charge, of government property to religious organizations.[40] To demonstrate an "injury in fact," the plaintiffs claimed that each member of the organization "would be deprived of the fair and constitutional use of his (her) tax dollar" if government-owned property was distributed to religious organizations.[41] Like in *Flast*, the taxpayer plaintiffs challenged the government action under the Establishment Clause. But, unlike in *Flast*, the Court held that they did not have standing when applying the two-part test outlined in *Flast*.[42]

The significance of this decision lies in the Court's clarification of *Flast*.[43] The Court reiterated that in order to meet both parts of the test dictated in *Flast*, the challenge must be directed at exercises of congressional power in violation of the Taxing and Spending Clause—specifically laws passed by Congress or congressional mandates.[44] In other words, to challenge the constitutionality of the use of federal funds, the expenditures or acts must be made pursuant to a congressional act and Congress must have acted under its powers under the Taxing and Spending Clause.[45] The Court held that a taxpayer challenging the transfer of federal property by the executive branch to a religious college pursuant to the Property Clause

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[39] 454 U.S. 464 (1982).

[40] *Id.* at 467-68.

[41] *Id.* at 469 (internal quotations omitted).

[42] *Id.* at 471.

[43] *Id.* at 479-80. The Court interpreted Article III justiciabilly requirements as preventing the federal cour‘s from becoming "'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* at 473 (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

[44] *Id.* at 480. Under *Flast*, when a plaintiff brings an Establishment Clause challenge, the plaintiff must allege a violation of the Taxing and Spending Clause. *Flast*, 392 U.S. at 103. However, in *Valley Forge*, the plaintiffs were challenging congressional exercise under the Property Clause, and were therefore denied standing. *Valley Forge*, 454 U.S. at 480.

[45] *Id.*

lacked standing because the transfer was not made pursuant to a congressional action.[46]

Acknowledging the brewing confusion with respect to taxpayer standing, the Court attempted to clear the line between Article III's fundamental standing requirements, an actual or threatened injury, and the Court's prudential limitations on standing outlined in *Frothingham*.[47] Furthermore, the Court in *Valley Forge* explained that *Flast* should not be applied casually or broadly; it should be applied with "rigor."[48] The Court recognized the potential move towards an unbridled challenge of government expenditures post-*Flast* and worked to limit such litigation. Subsequent decisions illustrate the Court's continuing efforts to limit the *Flast* doctrine, although some decisions have recalled *Flast*, granting taxpayer standing in situations in which it has previously been denied.

D. Programs Created by the Executive, Using Discretionary Funds: Setting the Stage

Six years after the *Valley Forge* decision, a federal taxpayer challenged the Adolescent Family Life Act ("AFLA"), in *Bowen v. Kendrick*,[49] alleging a violation of the Establishment Clause.[50] The AFLA gave religiously affiliated healthcare centers access to public funds when formulating their programs and services pursuant to the Act.[51] The Court held that the federal taxpayer

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[46] *Id.* at 479. The petitioners also lacked the requisite personal injury to meet the "nexus requirement" of the *Flast* test. *Id.* The petitioner's status as a taxpayer must be logically connected to the alleged infringement. *Id.* The Court noted that the injury complained of was almost identical to that which was alleged in *Frothingham*. *Id.* at 476. Similar to the finding in *Frothingham*, the Court explained that "plaintiffs' grievance was 'not a direct dollars-and-cents injury but is a religious difference.' A case or controversy did not exist ...." *Id.* at 478 (internal citations omitted) (quoting Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952)).

[47] *Id.* at 475 (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)). These limitations deny standing to those alleged injuries concerning "abstract questions of wide public significance," amounting to "generalized grievances." Perhaps the prudential limitations are of significance to the Court because they are self-imposed limitations, in an effort to control judicial activism and limit judicial intervention. Wilders, *supra* note 4, at 1201.

[48] *Valley Forge*, 454 U.S. at 481.

[49] 487 U.S. 589 (1988).

[50] *Id.* at 593.

[51] *Id.*

did have standing to challenge this exercise of congressional power since there was a sufficient nexus "between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power," because the AFLA was a law authorized by the Taxing and Spending Clause.[52]

The decision is significant not only because it expanded the *Flast* doctrine, but also because it involved the same type of disbursement of funds as the instant case, *Hein*.[53] The funds, though authorized by the AFLA, were distributed at the discretion of the government agency.[54] Although Congress approved the funds, it did not explicitly permit the Secretary of Health and Human Services to administer the moneys to religious organizations; but nor did the Act explicitly prevent distribution to religious organizations.[55] The AFLA expressly contemplated that some of the moneys would be granted to projects sponsored by religious groups, hinting at Congress's more explicit direction.[56] Although the Court acknowledged that the Secretary distributed the funds at his own discretion, it found that fact immaterial.[57] The Court held that "administration by the executive department did not destroy the nexus between the taxpayer and the congressional exercise of its taxing and spending power."[58]

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[52] *Id.* at 620.

[53] *See id.* at 594. The Act left it up to the discretion of the Secretary of Health and Human Services to define exactly what types of services the grantee must provide, though it did list some requirements and limitations. *Id.* Similarly, in the instant case, the funds granted to the executive branch are distributed at the Executive's discretion.

[54] *Id.*

[55] *See id.* at 594. It seems as if the decisions determining taxpayer standing depend significantly on whether the program funded is an exercise of Congress's taxing and spending power. The petitioner's status as a taxpayer remains the same in most of these decisions. The type of program, the way the program was enacted, and from where the funds supporting the program are derived seem to be the most significant determinations by the Court.

[56] *Id.* at 623. (O'Connor, J., concurring) (noting the "partnership between government and religious institutions contemplated by the AFLA").

[57] *Id.* at 620.

[58] Wilders, *supra* note 4, at 1207. Giving the plaintiff standing to challenge the Secretary's actions in executing the program, this decision still failed to answer whether a program created by the executive, and not by Congress, and funded only through discretionary funds, could be raised in federal court under the taxpayer standing doctrine. *Id.* at 1202.

III. HEIN V. FREEDOM FROM RELIGION FOUNDATION

A. Majority Opinion

In *Hein*, the Court held that the Seventh Circuit's broad reading of *Flast* was incorrect.[59] More specifically, the Court reiterated that the *Flast* test created a very narrow exception to the general rule that taxpayers are without standing to challenge government expenditures.[60] In the Court's view, taxpayer standing to assert an Establishment Clause violation requires that a plaintiff challenge a specific exercise of congressional power, such as a law specifically authorizing the distribution of funds to a specific program or place.[61] Because the various conferences and speeches promoting faith-based initiatives of which FFRF complained were paid for out of general executive branch appropriations, this crucial element was not satisfied in *Hein*.[62] The Court chose neither to overrule *Flast* nor to extend its purview, but to simply "leave [it] as [they] found it"—a narrow exception to the general rule.[63]

The Court began its analysis by reaffirming the well-established Article III justiciability requirements.[64] The Court discussed the importance of maintaining requisite standing within the context of the Constitution's case or controversy requirement and noted policy reasons for its well-established rules.[65] The Court then reiterated the general rule regarding taxpayer standing, stating that "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing."[66] Citing a plethora of precedent affirming the general rule,[67]

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[59] *Hein*, 127 S. Ct. at 2559.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 2572.

[64] *Id.* at 2562.

[65] *Id.* The Court quoted, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

[66] *Id.* at 2563.

[67] *See* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1862 (2006).

including the most recent *DaimlerChrysler Corp. v. Cuno* decision, the Court noted that the federal taxpayer's "generalized" and "attenuated" interests, as well as the "general grievance" of which he or she complains, are shared with millions of other citizens.[68]

The Court distinguished *Hein* from *Flast*, focusing on the nature of the expenditures in *Flast,* which were made pursuant to congressional authorization, and the nature of the expenditures in *Hein*, which were made by the executive branch using discretionary funds from its general appropriations budget. The Court attacked the potential controversy head-on, and explained that a broad reading of *Flast* fails to observe the "rigor with which the *Flast* exception to the *Frothingham* principal ought to be applied."[69] Although the Court cited *Flast*'s two-prong test, its discussion of the test and why FFRF did not meet its requirements was minimum.[70] At the core, the Court relied on the missing link between a congressional action and a constitutional violation.

FFRF argued that it is arbitrary to distinguish between money spent pursuant to congressional mandate and discretionary funds spent out of general appropriations because the injury to taxpayers is exactly the same.[71] The Court rejected this argument by again emphasizing that *Flast* focused on explicit congressional action, and not executive branch discretionary spending.[72] Similarly, the Court distinguished the case from *Bowen* by noting that Congress had contemplated that some of the funds created by the act in *Bowen* could potentially be distributed to religious organizations.[73]

The Court concluded its analysis by noting several policy considerations that countered against an extension of *Flast*, including the potential unbridled litigation over every

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[68] *Hein*, 127 S. Ct. at 2563.

[69] *Id.* at 2565.

[70] *See id.* at 2566.

[71] *Id.* at 2568.

[72] *Id.* The Court noted that it was implementing Justice Powell's concurrence in *Richardson* and has "limited the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the results in *Flast* . . . ." *Id.* (quoting United States v. Richardson, 418 U.S. 166, 196 (1974)).

[73] *Id.* at 2567.

conference held, or every proclamation or speech made with discretionary funds from the executive branch appropriations.[74] Also noting separation of powers concerns, the Court criticized *Flast* for discrediting and, in effect, overlooking those concerns by permitting judicial intervention.[75] The Court refused to accept FFRF's argument that there was in fact a way to "trace" the taxpayer burden that could potentially give rise to a more particularized, redressable injury.[76] Casually, the Court also refused to accept the "parade of horribles" FFRF predicted would occur if *Flast* was not extended, arguing that none of these "horribles" have occurred yet, and if they did, Congress could step in to provide a remedy.[77] In light of potential concerns, the Court refrained from taking preventative action, delivering instead a narrow decision that not only refused to extend the *Flast* doctrine, but also limited it to its most literal interpretation.

B. Justice Kennedy's Concurring Opinion

In his concurrence, Justice Kennedy expressed his reluctance to expand judicial authority and argued for limited judicial intervention.[78] In assessing the relationship between *Flast* and the instant case, Justice Kennedy noted that if standing had been found, the narrow exception carved out in *Flast* would automatically have become "boundless."[79] Justice Kennedy acknowledged that taxpayers should have standing in some limited situations; however, he considered the public events and public speeches of which FFRF complained as "part

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[74] *Id.* at 2569.

[75] *Id.* The Court explained that *Flast* gave too little weight to separation of powers concerns by framing the standing question as whether it would be presented in an adversary context and in a form traditionally recognized as capable of judicial intervention. *Id.* Essentially, the Court argued that the *Flast* Court created a boundless doctrine. *Id.*

[76] *Id.* at 2570. Citing to the Seventh Circuit's decision, the Court argued its approach (asking whether the marginal cost exceeded zero) would surely create difficult "line-drawing problems." *Id.* The Court rejected the very idea of pin-pointing some type of traceable particularized injury by the Seventh Circuit, and further rejected the respondent's argument for "screen[ing] out . . . content of [every] particular speech" along the way. *Id.* at 2571. The Court described this idea as "vague and ill-defined." *Id.*

[77] *Id.* at 2571.

[78] *Id.* at 2573 (Kennedy, J., concurring).

[79] *Id.* at 2572.

of the open discussion essential to democratic self-government."[80] He emphasized the importance of separation of powers and argued that the executive branch should be "free . . . to discover new ideas . . . and to find creative responses to address governmental concerns."[81]

C. Justice Scalia's Concurring Opinion

Justice Scalia, joined by Justice Thomas, concurred in the opinion by emphasizing the vast inconsistencies within the realm of taxpayer standing law.[82] Justice Scalia enthusiastically criticized the plurality for failing to settle the inconsistencies and, in his opinion, for further contributing to the confusion and inconsistency within this area of the law.[83] He recognized the inconsistency stemming from two different conceptions of injury in fact: "wallet injury" and "psychic injury."[84] Justice Scalia emphasized the Court's illogic by wading through the five most recent Supreme Court decisions involving taxpayer standing, some granting standing on the basis of a "psychic injury" and others denying standing on the ground the plaintiff had nothing but a "psychic injury."[85]

Arguing that *Flast* should have been overruled, Justice Scalia criticized the plurality for failing to acknowledge that *Flast* is actually indistinguishable from *Hein*.[86] He explained: "Whether the challenged government expenditure is expressly allocated by a specific congressional enactment *has absolutely no relevance* to the Article III criteria of injury in fact, traceability, and redressability."[87] Furthermore, Justice Scalia

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[80] *Id.*

[81] *Id.* Justice Kennedy warned against constant judicial supervision; though, he concluded his argument by reminding the legislative and the executive branches that decisions should always be made in light of the Constitutional provisions as a matter of principle. *Id.*

[82] *Id.* at 2574 (Scalia, J., concurring).

[83] *Id.* at 2573.

[84] *Id.* at 2574. The "wallet injury" can be considered particularized and traceable, also known as an "injury in fact"; the "psychic injury" may also be referred to as general mental displeasure with the money spent by the government. *Id.*

[85] *Id.* Justice Scalia noted, "[w]e initially denied taxpayer standing based on Wallet Injury, but then found standing in some later cases based on the limited version of Psychic Injury . . . ." *Id.* at 2575.

[86] *Id.* at 2580.

[87] *Id.*

was concerned that the pluralilty's opinion implied that the executive branch could essentially fund anything as long as it uses funds from its general appropriations budget, and not pursuant to any explicit act of congressional power.[88] Justice Scalia maintained his view that taxpayers should not have standing under any circumstance.[89]

D. Justice Souter's Dissenting Opinion

Justice Souter's dissent found no distinction between *Flast, Bowen,* and the instant case.[90] He specifically disputed Justice Alito's separation of powers argument.[91] Justice Souter contended that there was no difference between a "Judicial branch review of an executive decision and a judicial evaluation of a congressional one."[92] In other words, although funding decisions may be made by different branches, the same judicial review should apply to all. Justice Souter concluded by arguing that the injury alleged in the instant case was one that was judicially cognizable, as demonstrated by recent decisions recognizing a "psychic injury" in satisfaction of Article III's standing requirements.[93] He explained that *Flast* among other decisions recognized a plaintiff's standing even in the absence of injury to "flesh or purse," and remained adamant that precedent recognized standing in contexts such as the case at hand.[94]

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[88] *Id.*

[89] Justice Scalia noted the serious undertaking of overruling prior precedents; however, he argued this is one situation where the interest of justice so requires it. He wrote: "We had an opportunity today to erase this blot on our jurisprudence, but instead have simply smudged it." *Id.* at 2584.

[90] *Id.* at 2586 (Souter, J., dissenting). Justice Souter noted that the distinction between a "congressional mandate" on one hand and "executive mandate" on the other, is "arbitrary and hard to manage . . . ." *Id.*

[91] *Id.* Justice Souter disagreed with the plurality's separation of powers argument which attempted to explain the distinction between a legislative and an executive spending decision. *Id.*

[92] *Id.*

[93] *Id.* at 2587. Justice Souter relied on the *Flast* opinion when he noted that when the government spends money for religious purposes, a taxpayer's injury is one that is most definitely "judicially cognizable." *Id.*

[94] *Id.* at 2588. Justice Souter believed the "interest sought to be protected" is the most important element to consider when determining an injury in fact. He contended there is no mechanical definition or example of cognizable harm. *Id.* at 2587.

IV. DISCUSSION

In deciding *Hein v. Freedom from Religion Foundation*, the Supreme Court encountered many prior cases and potentially convincing arguments for the expansion of taxpayer standing.[95] Nonetheless, the Court decided to limit the *Flast* exception to the general prohibition on taxpayer standing to the facts of that case.[96] One interesting aspect of *Hein* is its narrow holding; notably the Court did not overrule precedent that found taxpayer standing in similar cases.[97] As Justice Scalia noted in his concurrence, the Court's moderate approach and reasoning resulted in a non-binding plurality decision.[98] In light of the individual facet of the *Flast* test focused on by the Court, and the minimal discussion of the actual application of the *Flast* test, the future of taxpayer standing cases remains uncertain.

The public policy implications of this decision are significant. Denying taxpayer standing reinforces long-standing arguments for the separation of powers. Whether the Court should exercise judicial restraint by limiting the judiciary's ability to patrol the executive and legislative branches' spending is a matter of judicial philosophy that will always tilt one way or the other. In light of *Hein*, however, it seems the current Justices want to limit judicial power to hear such disputes to those that clearly involve the constitutionality of a congressional mandate made pursuant to the Taxing and Spending Clause and that most certainly impose a direct and negative consequence upon a plaintiff which is causally linked to the enactment.

One may also interpret the Court's decision as indicative of its willful blindness; critics may see in *Hein* a blow to executive transparency and accountability. The split may simply be a matter of judicial philosophy, with the plurality advocating limited judicial intervention in respect of separation of powers and the dissenters advocating judicially dictated finality.[99]

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[95] *Id.* at 2562-73 (majority opinion).
[96] *Id.* at 2562.
[97] *See id.* at 2572.
[98] *Id.* at 2573 (Scalia, J., concurring).
[99] *See id.* at 2569-70.

With this decision, executive agencies are authorized to spend discretionary funds, as long as the funds are not spent pursuant to an explicit congressional exercise. Other limitations to spending do exist; however, *Hein* illustrates a very significant loophole for an executive branch that seeks to take action to further particular and controversial initiatives.[100] But to say the Supreme Court has spoken for the last time on this issue is a stretch in light of unpredictable taxpayer standing law.[101]

V. CONCLUSION

In *Hein v. Freedom From Religion Foundation* the Court held that *Flast* permitted taxpayer challenges only to explicit acts of Congress that implicate the Establishment Clause. Taxpayers may not challenge executive branch spending of discretionary funds from its appropriations budget. This decision clearly insulates the current administration's spending from taxpayer challenges, but given the Court's precedent, some allowing taxpayer standing, others denying it, *Hein* is not the last word.

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[100] *Id.* at 2586 (Souter, J., dissenting).

[101] *See id.* at 2579-81. (Scalia, J., concurring).

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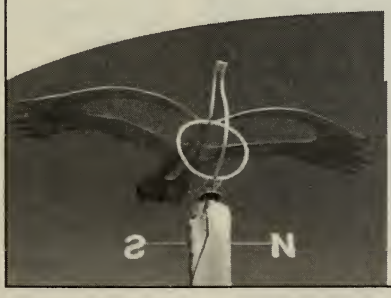

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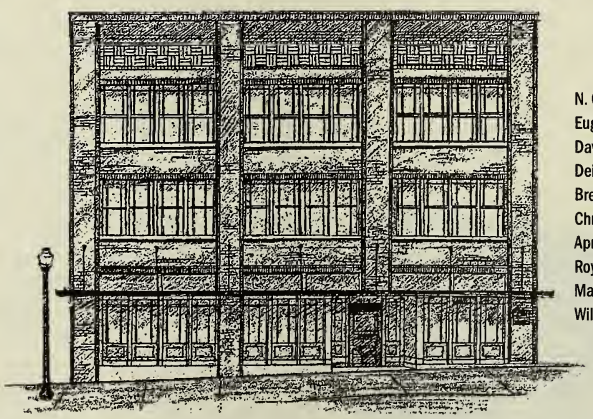

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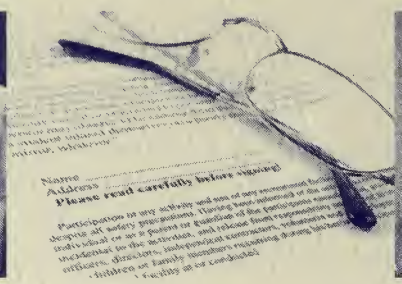

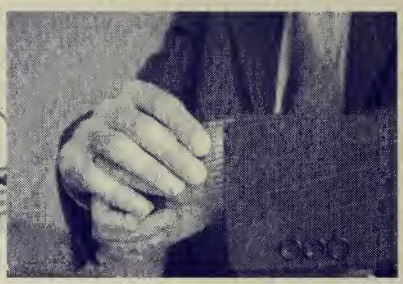

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